Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1996

THOMAS P. NORTON, JORDAN ASHLEY, INC., GOLD COAST DEVELOPERS, INC., NATIONAL VENDING SYSTEM, LTD., INC., PATRICIA RILEY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION, LINDA L. CARROLL,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a greeting card manufacturer and marketing representative commit Section 45(a) violations under Section 5(a) of the FTC Act where reliable consumer complaint statistics establish that consumers simply felt they were ignored?

II. Is a greeting card manufacturer and marketing representative a franchise within the meaning of the Franchise Rule if the manufacturer and marketing representative merely refers its distributors to the services of a location company upon written request to do so from distributors?

III. Were Tom Norton and the other parties given a full and fair opportunity to prepare their case, and present it to the district court under the highly irregular circumstances of this case?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here are as follows:

Jordan Ashley, Inc.
Gold Coast Developers, Inc.
National Vending Systems, Ltd., Inc.
Christine M. Heller
Kelli J. Blasi
Thomas P. Norton
Patricia Riley

There is no parent or subsidiary company of any party to be listed.

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STATEMENT OF JURISDICTION

The court of appeals entered its judgment on October 29, 1996, and order on Petition for Rehearing and Suggestion for Rehearing En Banc on February 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

The pertinent statutory provisions and regulation involved are:

15 U.S.C. § 45(a)(1);

15 U.S.C. § 53(b); and

16 C.F.R. § 436.2(a)(1)(i)

See App. D, *infra.*

STATEMENT OF THE CASE

A. Introduction

Tom Norton's life came to an abrupt standstill and took an entirely new and negative direction on December 8, 1993. At 11:30 a.m. that morning, senior officials from Washington, D.C., the State of Florida, and the local police in the suburbs of Miami gained

entry into the main building of his corporate headquarters in North Bay Village, Florida. A federal receiver who had been appointed by the District Court for the Southern District of Florida in Miami two days earlier announced to all of the observers, mostly employees, that the receiver was taking control of the operations and possession of the entire contents of the building. The presidents of two companies, Christine Heller and Kelli Blasi, were quickly identified and interrogated by officials, especially Linda Carroll. The books and records for all of the businesses were surrendered into the receiver's possession. There was no resistance from the corporate officers and employees. The receiver then turned over the entire corporate network of computers, file cabinets, office furniture and loose paperwork to an organized group of attorneys from the Federal Trade Commission in Washington, who had gathered together in Miami, to monitor and supervise the entry on the premises and the service of a civil summons and complaint on Tom Norton, Christine Heller, Kelli Blasi and three corporations.

The FTC's physical intrusion into Tom Norton's life must have been carefully planned and orchestrated. The FTC's efforts were focused on Tom, and they had already completed an investigation by one of their seasoned full-time investigators who worked on the case for over three months prior to officials showing up at his corporate offices armed with the police. The FTC concealed the investigation from Tom Norton, as well as the fact that it had received complaints from 46 out of 1,000 distributors about a company in which he was involved. The FTC also did not inform him they were tracking down 42 of these distributors for private interviews. Roughly half of these people agreed to sign statements, and declarations were prepared by the FTC attorneys. The investigator also posed as a distributor and used a phony name and address on the telephone to gain the confidence of one employee during working hours. The investigator's true identity appeared much later in his declaration about the investigation. Tom Norton and the company employee were not made aware of either the existence or details of the investigation until after the investigation was closed and a case was filed against him in federal court.

Given the time and effort spent on developing this case against Tom Norton, FTC officials must have been disappointed to find that he was not in his office when the attempt was made to serve him with a summons and complaint. Tom Norton was driving in his car to another destination when federal regulators appeared at his office. An employee inside the building promptly notified Tom of the incident by telephone. He immediately returned to his office where he cooperated with officials from the Florida State Comptroller's office who were on the scene to execute service of process on behalf of the FTC. Tom accepted service of legal process voluntarily, and he was handed a civil summons and complaint along with eleven other pleadings. Included in this mountain of confusing legal documents were three neatly-bound volumes of exhibits containing 18 handwritten complaints by distributors and 22 professionally prepared sworn declarations, including that of the undercover investigator, Robert Ireland, alias Doug McGee. Tom was surprised to learn five days later after speaking with an attorney that all 13 pleadings had already been investigated, researched, written, and entered in the case against him before he was apprised that federal authorities were concerned about complaints from distributors in one of the businesses which involved him.

Tom Norton consulted an attorney about the FTC's allegations against him. The attorney quickly came and left. He withdrew, not because Tom did anything wrong in the relationship, but instead because the FTC obtained a temporary restraining order from the lower court which included a freeze on assets. This restrained Tom Norton's ability to pay for the necessities in life. The FTC, the federal receiver, and the lower court would not lift the freeze for attorneys' fees or other such necessities. They refused Tom Norton's plea for a qualified, competent attorney in this case.

The asset freeze was not the only restraint imposed on Tom Norton early in this case. The TRO also appointed a full equity receiver, Linda Carroll. Linda Carroll's duties were set forth in the TRO. She was instructed to assume full control of the corporate

defendants and their affiliates and subsidiaries, to remove Tom Norton, all officers, and employees from control and management of the affairs of those companies, and to manage and administer the business of the companies until further ordered otherwise.

The TRO was executed the same day process was served on Tom Norton. On that day, December 8, 1993, Tom Norton and employees of all the businesses, including Chris Heller and Kelli Blasi, were ordered to leave the corporate headquarters permanently.

Linda Carroll did not distinguish between the corporate defendants and non-affiliated businesses which were also not subsidiaries of the corporate defendants. The receiver changed the locks on the entire building with the contents still inside. Linda Carroll discontinued the businesses without seeking court permission. Tom Norton disagreed with the receiver, but was restrained from interfering and threatened with contempt. Tom Norton never saw the books and records of any of the businesses again. He was even denied access to his office and the businesses which were not accused of wrongdoing.

B. Greeting Card Companies

Tom Norton was a resourceful entrepreneur who involved himself in many business endeavors and employed a lot of people for 7 years before restraints were imposed upon him by the federal regulators: Jordan Ashley was only one of the businesses in which Tom Norton was involved Gold Coast was one other such business. Both companies worked hand in hand, but maintained a separate existence and pursued different business interests.

Jordan Ashley was interested in quality artwork and design. It designed and manufactured a wide assortment of greeting cards for all seasons and most occasions. Gold Coast was strictly a marketing and distribution company. Gold Coast marketed and distributed Jordan Ashley's line of greeting cards to the general public through distributors throughout the country. The distributors

showcased the cards on premium displays that were included in the purchase, in locations they desired. Established independent location companies provided site selection services for a fee from distributors who requested the referral. Jordan Ashley did its own in-house marketing and distribution until the end of the year 1991. Gold Coast began assuming those responsibilities gradually in 1989-1990.

Gold Coast accumulated a large inventory of over one million cards before it stopped purchasing from the manufacturer, Jordan Ashley. Jordan Ashley did not re-enter the market to compete with Gold Coast. In other words, before the FTC initiated this lawsuit, Gold Coast discontinued making purchases from Jordan Ashley, and Jordan Ashley discontinued making greeting cards.

On December 8, 1993, Gold Coast's inventory of one million greeting cards came into the possession of the federal receiver. Today, the receiver has the only remaining inventory of greeting cards produced by Jordan Ashley. When Gold Coast came into the possession of the receiver, Gold Coast had the ability to honor its continuing commitment to service the needs of distributors nationwide to make reorders and exchanges. Reorders and exchanges are important to distributors and the manufacturer's marketing representative in the greeting card industry. Distributors use reorders and exchanges to freshen stock, stimulate demand, and adjust to local consumer behavior patterns and individual tastes. The manufacturer's marketing representative uses reorders and exchanges as a way of multiplying revenues on packages of bulk card sales. When the receiver discontinued the business of Gold Coast, she upset the flow of cards in and around the market. Tom Norton was restrained from preventing her decision from having its natural adverse effects on Gold Coast, the distributors and the public.

After Jordan Ashley discontinued making and selling greeting cards, the company continued to use its established name and reputation and began doing business in the areas of paintings and

sculpture. In two short years, *i.e.*, by the end of 1993, the company had acquired valuable one-of-a-kind paintings and sculptures by nationally and internationally famous artists and sculptors, such as Bonnys and limited editions by Brett-Livingstone Strong. Familiar works of sculpture by Brett-Livingstone Strong include the Bicentennial/Constitution Monument in Philadelphia, Pa., and the Presidential Monument in Washington D.C. The FTC's complaint did not accuse Tom Norton or Jordan Ashley, its officers and employees of wrongdoing in this new line of business. It limited its allegations to activities in the greeting card business. In a similar vein, the TRO required Jordan Ashley to turn over books and records "relevant" to the FTC's action. When the receiver came into possession of Tom Norton's corporate offices, the FTC examined all the books and records including Jordan Ashley's current activities. Nevertheless, the FTC's complaint was not amended to incorporate any new allegations against Jordan Ashley for its activities in art, sculpture, and design. The FTC also did not introduce evidence at trial at variance with its core complaint. After trial, the final judgment was not based on any evidence concerning these unchallenged activities, which remain so today. Tom Norton was legally restrained furthering these legitimate pursuits in business for himself.

C. The Hatchery

There were various documents on the business premises on the day the receiver came into possession of all the books and records at the corporate offices. Among them were old contracts pertaining to the Red Lion Ostrich Hatchery. The Hatchery, as it was known, was not a subsidiary of either Jordan Ashley or Gold Coast and it was not affiliated with their activities. The Hatchery was a completely new venture in farming and, in particular, ostrich birds. The Hatchery began its existence before the FTC began its investigation of the 46 complaints against Jordan Ashley and/or Gold Coast. The Hatchery was Tom Norton's idea. He studied agriculture as a hobby and expanded his interest in ostriches from there. Tom Norton foresaw a large demand for the birds in the

nation's food chain. An initial partnership was formed that failed, and Tom Norton was one of the original partners whose name appeared on the contracts. The Hatchery eventually wound up being owned by Patricia Riley and Robert Junginger, who owned a smaller percentage of the business. Robert Junginger was one of five experienced experts in the field of avian sciences. He was employed at the Hatchery as the operations manager. Pat Riley was just beginning to learn the business from her husband and Robert Junginger. Tom was also instrumental in arranging financing. He involved himself in the business as a consultant. Chris Heller and Kelli Blasi had nothing to do with the Hatchery.

The consumers in this case did not complain about the Hatchery to the FTC. The FTC, in turn, did not complain to the lower court that the Hatchery was engaging in any wrongdoing. The Hatchery only became involved in this case because Tom Norton arranged for Kelli Blasi's approval on a series of development loans from Gold Coast to the Hatchery. She was the president of Gold Coast. The Hatchery needed the money to pay for the design and installation of costly plant and equipment which were required in its quarantine bird facility, which was fully licensed by the U.S. Department of Agriculture upon completion. The Hatchery was not in default on the loans. It repaid Gold Coast on some, but not all loans from its own profits. As a consequence, there was an unpaid principal balance still showing on Gold Coast's books and records at the time those books and records came into the possession of the receiver.

D. December 15, 1993 Hearing

Linda Carroll was the corporate receiver for Gold Coast. When she took charge of the books and records, she unilaterally recast the loans as equity investments and petitioned the lower court for instructions on how to expand her authority and powers and become the corporate receiver for the Hatchery. The Hatchery was a fictitious business name for Red Lion Seafood, Inc. At a hearing on the motion which was held on December 15, 1993, Linda Carroll

brought with her the old contracts pertaining to the failed partnership involving Tom Norton. She also prepared a flowchart for use at the hearing that attempted to summarize bank and other financial documents which she found lying around when she came into possession of the books and records at Gold Coast. Linda Carroll combined these totally incompatible pieces of paperwork together and showed them to the court as support for her move to recharacterize the loans as equity investments in a subsidiary corporation. She also theorized that the Hatchery was the alter ego of Gold Coast because Tom Norton was involved in both businesses, Gold Coast and the Hatchery. Tom Norton was again restrained to prevent the receiver from leading the lower court astray from how the loans were actually structured because he was absent from the hearing and under a doctor's care.

Pat Riley and Robert Junginger were present at the hearing on behalf of the Hatchery. The attorney she and Tom Norton consulted about the FTC's complaint against Jordan Ashley and Gold Coast was with them and appeared on behalf of all defendants. He objected to the evidence, but he, too, was restrained from doing anything about the lower court's chosen method of conducting the proceedings.

Basically, the court proceeded backwards. The side opposite Linda Carroll's motion bore the most unusual burden of going forward with evidence to rebut Linda Carroll's theories. In addition, the parties opposing the motion bore the burden of proving the loans were valid and enforceable. The judge relieved Linda Carroll of both such burdens, production and persuasion, and placed them on the side opposing her motion after viewing the evidence Linda Carroll brought to the hearing at the sidebar in the courtroom. In the end, the judge permitted Linda Carroll to use both forms of evidence, but did not require Linda Carroll to provide a proper foundation. Instead, she allowed Linda Carroll to introduce the contract and the flowchart into evidence through the opposing side's two witnesses, Pat Riley and Robert Junginger. As a result of this procedure, the receiver's flowchart was received into evidence

without the aid of Linda Carroll's testimony and, more importantly, cross-examination by the attorney for the side opposing her motion. Furthermore, the old contracts were received by the lower court without any testimony from either the maker of the contracts or any of the parties thereto, especially Tom Norton. This evidence was then relied upon by the judge, who granted Linda Carroll's petition and ordered Linda Carroll to serve as the corporate receiver for Red Lion Seafood, Inc., dba Red Lion Ostrich Hatchery. The favoritism for Linda Carroll which is displayed by the procedure which was used for conducting the December 15, 1993 hearing appears again in March of 1994, during the trial.

The lower court disregarded entirely the testimony of the opposing side's two witnesses. The lower court heard the testimony of Patricia Riley and Robert Junginger. Linda Carroll and the FTC attorneys were given an opportunity to cross-examine both witnesses. Robert Junginger was unimpeached by Linda Carroll's cross-examination of his testimony concerning the loans. He vouched for the validity of the loans under oath and at the risk of incurring potential liability for them as a part-owner of the business. Pat Riley gave similar corroborating evidence during her testimony. As between both witnesses, Robert Junginger had the greatest potential for giving credible and reliable testimony to the lower court. Robert Junginger was a stranger to this case, and his interest as a minority owner in this case could just as easily have been maintained regardless of whether a corporation receiver was appointed to the Hatchery. There is nothing in the hearing transcript which suggests the court considered his testimony biased or unbelievable. Nevertheless, his interest did present a problem for the receiver who wanted not only possession but also title to the entire business. The lower court amended the TRO and extended the receiver's powers and authority to the Hatchery.

Linda Carroll closed the Hatchery soon after it came into her possession. She was not qualified or personally interested in the business. Meanwhile, Robert Junginger lost his job and any right of ownership to the Hatchery. He was forced to move from Florida

to Texas to continue working in his profession. Pat Riley also lost her legal interest in the business and a chance to begin a new career in a business of her own. Tom Norton lost a potential source of income to support himself and maintain a defense against the FTC.

E. Third Parties

Given the restraints imposed upon Tom Norton by the FTC's summons and complaint, the asset freeze, and the corporate receiver, Tom Norton became a public charge almost overnight. Economically, he had only two positive alternatives, both of which he found distasteful. Nevertheless, he had to make a choice. He resisted welfare and unemployment and, instead, chose to grow more dependent on three important women in his life — his ill mother, his wife, and the couple's elderly former neighbor. Selma Norton, Tom's mother, loaned him money. His wife, Patricia Riley, stood by him and cared for him. Mary Caprario, the couple's former neighbor, was a friend to both of them. All three women have been affected adversely by the FTC's lawsuit and tormented by the receiver.

The receiver placed a freeze on Selma Norton's bank accounts in New Jersey which required legal counsel for the first time in her life since she fell and permanently injured her brain stem while cleaning houses for a living. The fall occurred many years ago and left her disabled and in chronic continuous pain. The receiver also seized $64,000 of Mrs. Norton's money, and an additional $15,000 of Mary Caprario's money. These two elderly women, both of modest independent means, had to prosecute an appeal to the Eleventh Circuit in order to obtain an opportunity to present their claims in the lower court. For them, the process began in October of 1994 and has not ended yet.

The FTC and the receiver subpoenaed both Mrs. Norton and Mrs. Caprario for oral depositions. Only Selma Norton escaped unnecessary interrogation by the receiver and the FTC trial attorney. Her deposition was canceled because of her illness, but she had to

hire a lawyer to avoid contempt for being unable to appear at the deposition which was scheduled several miles from her home in downtown Newark, N.J. She cannot drive a car. The FTC attorneys and the receiver were aware of her chronic illness before they hired a process server to deliver a subpoena to her home in the suburbs in the dark at 8 o'clock at night. The FTC's trial attorney on occasion still mentions wanting to depose Mrs. Norton.

The receiver deposed Mrs. Caprario in order to question her about her personal financial affairs because she bid on $15,000 worth of household items at a public auction held by the receiver. Mrs. Caprario's appeal was precipitated by the manner in which this auction was conducted. Mrs. Caprario is a former employee of the United Nations and the widow of a former U.N. ambassador. She retired in Florida long ago and is now living on a pension. Mrs. Caprario also does not drive and her deposition, which was again unnecessary, required legal assistance.

F. Condominium

Patricia Riley and Tom Norton were married only 3 months when this case invaded their lives. They were engaged for about one year. The couple were living in Pat's home, a two-bedroom condominium in North Miami Beach, Florida. Five days after Tom received the summons and complaint, while the couple were consulting an attorney about the FTC's lawsuit, the receiver entered into possession of the condominium and changed the locks with the furnishings and their personal belongings still inside.

Patricia Riley and Tom Norton have not lived in peace since the December 15, 1993 hearing on the Hatchery. The receiver entered into possession of Pat Riley's condominium and changed the locks on December 13, 1993. By motion filed on December 14, 1993, Pat Riley challenged the receiver's naked seizure of the condominium and the couple's furnishings and belongings. Her motion was denied the next day, at the December 15, 1993 hearing on the Hatchery. Pat Riley never slept another night again in her home.

Patricia Riley was the owner of the condominium. The judge denied her claim because she was involved when assets were disturbed after the FTC's restraints were imposed. Patricia Riley withdrew $85,000 from the Hatchery's business account. She also recorded a quitclaim deed to the condominium, giving Dade County notice of her claim to the real property and its contents.

At the hearing on the Hatchery, the court considered Patricia Riley's claim of title to the condominium. Pat also testified about the $85,000 bank withdrawal. She freely admitted under oath that she withdrew the sum of $85,000 from an account in the name of the Hatchery. The account was maintained at Northern Trust Bank. She obtained the money payable in three increments, $25,000 for legal fees, $30,000 for a shipment of imported eggs for the Hatchery, and $30,000 for living expenses. The withdrawal was made after she and Tom Norton consulted an attorney about the lawsuit and the legal papers that were served on Tom. The Hatchery was not mentioned in any of the pleadings, including the complaint and the TRO. Pat Riley believed after consulting these two sources that the withdrawal was appropriate and proper, and not illegal, considering also that the Hatchery was a separate business which was not involved in the manufacture and sale of greeting cards. The attorney with whom the consultation occurred was present and active in the courtroom that day. The attorney acknowledged receiving and depositing in the firm's trust account both checks totalling $25,000 in the amount of $20,000 and $5,000, respectively. The attorney also did not voice a disagreement with any portion of Patricia Riley's testimony regarding the steps she took in making her decision as the majority owner of the Hatchery as to what action if any should be taken to insure the money was safe and securely free of any improper interference from the FTC's lawsuit.

Pat Riley's belief was consistent at the time with the belief held by officials at Northern Trust Bank. During the hearing, Linda Carroll volunteered the fact that the bank did not consider itself, the Hatchery, or signatories on the account to be restrained in any way by the TRO. The lower court, however, interpreted the TRO

much more broadly than its terms conveyed to Pat Riley, an independent attorney, and officials at Northern Trust Bank. All of these persons were ordered to deliver the $85,000 to the receiver. The receiver has not since relied on that order to withdraw all or any portion of the sum of $5,000 still remaining on deposit at the bank.

During the hearing, the lower court permitted Linda Carroll and the FTC's attorney to each have an opportunity to cross-examine Patricia Riley. Her testimony was not impeached by either party.

Of special importance in this regard is Patricia Riley's testimony that she received the condominium as a gift to marry Tom Norton. In other words, the deed was delivered to her *before* the FTC imposed any restraints on Tom Norton. Tom purchased the unit on or about the time the couple got engaged. The condominium was in the name of Gold Coast for convenience, as well as credit purposes. Tom Norton had few assets other than his car, and businesses which made him proud. For Tom Norton, the condominium was simply easier to purchase and finance in the name of Gold Coast. In addition, as Linda Carroll pointed out through Pat Riley's testimony, Gold Coast paid off the mortgage before the principal balance came due. Records in Linda Carroll's possession disclosed that the payment was made in one lump sum near the time of the wedding. Prior to the marriage, however, a pattern developed of making regular monthly mortgage payments. The receiver offered no explanation for the sudden change in this established pattern of behavior.

Patricia Riley lost title to the condominium as well, as a result of the FTC's case against her husband. Upon motion made by the receiver in July of 1994, the lower court voided Pat Riley's marital gift as a fraudulent conveyance. No evidence of fraud in respect to the condominium was presented to the court in support of the receiver's motion. What transpired in the interim between the December 15, 1993 hearing and the receiver's motion was the trial of the FTC's lawsuit against her husband in March of 1994. Tom

Norton along with all of the named defendants lost the case and were directed in the final order to cause title in the condominium to be transferred to the receiver.

During a hearing on several pending matters in July of 1994, the lower court considered Linda Carroll's motion. At the hearing, the judge explained that the provision in her final order directing Tom Norton to relinquish title to the condominium was premised on a finding that the recording of Patricia Riley's deed was a fraudulent conveyance This finding, according to the lower court, was based on the December 15, 1993 hearing. The judge remarked that she found it incredible to believe Patricia Riley would not record the deed to protect herself because she is a former litigation secretary from a law firm in Washington, D.C. The judge also observed that Pat Riley's deed was notarized by Chris Heller's husband, a notary. Chris Heller was the president of Jordan Ashley. Furthermore, the signature on the deed on behalf of the owner of record, Gold Coast, was that of Kelli Blasi, the president of Gold Coast. In other words, Patricia Riley lost possession and title to the condominium, which was her present for marrying Tom Norton, for one or two reasons. Either she knowingly sat on her claim for too long for her own good, *i.e.*, she should have known to record the deed and had the foresight to predict the FTC's lawsuit; or, she never had a claim in the first place, *i.e.*, the deed itself was fraudulent.

Patricia Riley testified at the December 15, 1993 hearing that she did not record the deed because she honestly did not realize she had a legal duty to record a deed to protect herself from an unexpected lawsuit by the FTC against her husband. Had she known to record the deed she probably would have done so given her age, and other factors to be gleaned from her testimony. She was 43 years old and getting ready to marry a man whom she had known one year. She felt protected in no other way than having the deed delivered to her in her name before they were married. The deed she recorded was a deed she received delivery of, the morning of her wedding three months before the hearing. She felt safe and protected holding the deed in her possession the entire three months.

Then, the federal receiver appeared in her midst, and took possession of her husband's corporate offices. While discussing the lawsuit with her husband and a group comprised of Tom Norton, Chris Heller, Kelli Blasi, and their husbands, someone other than her husband suggested that Pat should record her deed. She acted on the suggestion and recorded the deed the very next day.

The fact that the parties were related does not explain why the deed was fraudulent. Apparently recognizing this, the lower court looked to the Florida Fraudulent Transfer Act as a basis for articulating her reasons for voiding the deed. In order to apply the Florida statute, the judge had to find that a transfer was made of the condominium with actual intent to defraud the FTC. *See* Fla. Stat. Ann. §§ 726.101-726.112. The judge ignored the actual transfer that occurred earlier upon delivery of the deed to Pat Riley. The judge said that all the parties actually intended to defraud the FTC because Pat Riley recorded the deed one day after she learned of the restraints imposed on Gold Coast. The judge did not look further into the authenticity of the deed itself before turning to the Florida statute. This procedure cheated every side on the issue, including the lower court, from hearing testimony from Michael Heller, the notary whose duty it most surely was to keep a record of the ceremony to which he swore by his own signature under oath and penalty of perjury. Strangers to this case, such as Mrs. Caprario, might also have been summoned to appear before the court and corroborate or refute Pat Riley's testimony concerning her gift for marrying Tom Norton. The significance the condominium plays in this case as the most valuable remaining asset in the receivership estate warrants a fresh new look at the issue, not merely for the sake of Pat Riley and her marriage to Tom Norton, but for the welfare of the public, whose interest in maintaining the privacy of an individual's home free of wrongful governmental interference is also at stake and should not be taken away unjustly or unfairly.

Pat Riley did not receive an advance hearing on the seizure by the receiver. The seizure was justified by the lower court because it was followed by the December 15, 1993 hearing. The lower court

determined that its procedures at the hearing satisfied minimum constitutional guarantees of a prompt, post-seizure hearing. Pat Riley disagrees.

G. National Vending

National Vending was held jointly and severally liable for the final judgment in this case. At no time did National Vending engage in the manufacture or sale of greeting cards. The company, a simple vending machine operation, went out of business in 1990. Prior thereto, National Vending had no dealings with the consumer public on whose behalf the FTC initiated this case. The FTC developed and used no new evidence at trial at variance with these facts. The final judgment is also not based on contrary findings. The only mention of the company in the record by the lower court is in the court's final judgment and order. The finding was that telephone bills for all of the corporate defendants were held in the name of National Vending. This finding was based on Linda Carroll's testimony during the trial. Linda Carroll was the corporate receiver and nothing more. Nevertheless, relying on the testimony of this one witness, the court concluded that National Vending engaged in unfair trade practices, specifically misrepresentations to the public, and held the company liable for $9.1 million.

H. The Trial

The trial lasted only two days and occurred on March 8, and March 14, 1994. The FTC's case consisted of the testimony from each of 4 individual consumers, Linda Carroll, and Gary Edwards, a former accountant for Jordan Ashley and Gold Coast. Tom Norton was hampered in his ability to prepare a defense by the restraints imposed upon him in this case. The first attorney he consulted about the lawsuit, and who handled matters at the December 15, 1993 hearing withdrew after the lower court ordered him at the hearing to return the Hatchery money which was paid to him as a retainer for his services. Tom had no legal training or experience, so he worked with an attorney who in the past handled leases and other

routine small business matters for him. The attorney volunteered his time and services though his heart was not in the case. Facing insurmountable obstacles, he, too, moved to withdraw, but his motion was denied. His fees are still not paid because the judge would not approve his reasonable requests for relief from the freeze order. Upon considering these factors and the way Tom Norton and everyone around him were treated by the FTC the receiver, and the process in the lower court, Tom did not testify in his own defense for fear of the unknown. His attorney did his best to defend Tom Norton by going with him to the trial and simply cross-examining the FTC's witnesses.

Tom's decision proved to be prophetic. During the 5-day break in the two-day trial, the receiver, Linda Carroll, wrote a letter to the judge in secret. In her letter, the receiver informed the lower court that she was planning to perjure Tom Norton on the second day of trial and would the judge please keep it quiet and assist her in so doing. She wrote, *"The purpose of this letter is to request that Mr. Norton be required to testify, under oath, at next Monday's hearing . . . I have been waiting for an opportunity to pursue . . . Moreover, if you determine to make this inquiry, I would request that you not inform him, at this time, that I have advised you . . . I am not sending a copy of this letter to his attorney." See* Appendix E, F. Two days after the trial, the letter was delivered to the docket clerk by the courtroom deputy, sealed, and placed in the vault.

At no time throughout the trial was Tom Norton or his attorney informed about Linda Carroll's letter. Plenty of opportunities existed for Linda Carroll and Judge Nesbitt to purge themselves of the *ex parte* communication which occurred during Tom Norton's trial, and to disclose its existence on the record to the parties and their attorneys on both sides of the litigation. The safest, fairest solution would have been to leave the letter unopened until the trial resumed, and then simply open the letter and read it in open court. Other methods of handling the document were also then available once the letter had been opened by the judge in private. Linda Carroll testified on the second day of trial and was cross-examined by Tom

Norton's attorney. The judge could have circulated the letter at that time in order to give both sides an opportunity to use it for whatever legitimate purpose they desired. Still other fair and timely alternatives remained available to the lower court even after Linda Carroll testified. Judge Nesbitt did not approve the letter to be placed in the vault and sealed until two days after the trial. Today, however, there is no fair and just solution for Tom Norton short of a new trial.

The joint, concerted silence on the part of Linda Carroll and Judge Nesbitt secreted important evidence away from Tom Norton and his attorney. Linda Carroll's letter is an invaluable document for Tom Norton's defense because contained in that one letter is irrefutable evidence of the unfairness and injustice in the process which was used to determine his important legal rights. What the document discloses is the liberty with which the federal receiver was allowed to maneuver around in this case acting not merely as a corporate receiver, but as Tom Norton's opponent as well, with the knowing acquiescence and assistance of the lower court, while Tom Norton's liberty to continue with his life with the status quo preserved until this case has been resolved was restrained from every angle, even interfered with in several aforementioned respects. This was not merely an aberration in the trial process, it was a structural defect buried deep within the mechanism of the trial itself. *See Arizona v. Fulminante*, 499 U.S. 279 (1991).

To be sure, a new trial will not remedy the many injustices of the past. The Hatchery, for example, has been dismantled and cannot be reassembled profitably at this time. Similarly, Jordan Ashley's valuable inventory of artwork and sculptures have been sold for next to nothing, damaged beyond repair, and in some cases lost or destroyed. A new trial will begin the healing process, however, by giving Tom Norton the opportunity to which he was entitled in any event, to properly defend himself against the FTC's serious allegations of wrongdoing.

I. Judgment

Tom Norton was held liable by the present judgment in this case for $9.1 million in damages, and permanently restrained by a laundry list of conduct prohibitions, reporting requirements, stays, and duties. Tom Norton is not allowed to be involved in any franchise, or business venture, and telemarketing is prohibited unless he posts a $5 million bond in favor of the FTC. In addition to these restraints, the receiver was appointed permanently to take charge collecting the $9.1 million from him while liquidating her accumulated inventory of now insolvent corporations. If the process continues in the same direction it has followed in the past, the injuries and damages will multiply and spread to upwards of 1,000 distributors to whom a false promise has been made that justice would be done upon the final outcome of this case. If the trend continues, the ugly truth will then appear to all of them and more, that justice was not done, because Tom Norton was restrained from every direction to help them, himself, and others, while a federal receiver was at liberty to run profitable businesses into the ground and waste and consume other valuable assets which came into her possession when this case was first begun. Our system of justice simply cannot tolerate such results, especially since only one half of the participants — the FTC — has been handed the golden opportunity to litigate the core issue in this case.

Tom Norton, the FTC's leading opponent, needs a chance to tell his story too. This is why.

REASONS FOR GRANTING THE WRIT

The district court was presented with only one side of the case. As a result, two of the lower court's most important legal conclusions were based upon an incomplete record and were reached in error. The first such legal conclusion is that Tom Norton violated Section 45(a) by misrepresenting the goods and services that all of his companies produced. *See* 15 U.S.C. § 45(a). The second erroneous legal conclusion is that all of the businesses were

one franchise. *See* 16 C.F.R. § 436.2(a). Tom Norton concedes that the companies did not make the public written disclosures required by the franchise rule. *See* 16 C.F.R. § 436.1(a)(1)-(a)(20). His legal position is that the companies were engaging in multiple, separate businesses, none of which constituted a franchise at any time. Although Tom Norton has consistently maintained this legal posture, he believes he has not been afforded either the means to prepare a proper defense, or a full and fair opportunity to present his case before an impartial district court. As a result, he believes the record itself will demonstrate that he has not been accorded the same treatment which was given to the plaintiff in this case, the FTC. Since the early inception of this case, Tom Norton has been accused of wrongdoing by various means at different points in time. All such accusations are of equally high importance to him and he wishes the Court to consider all of them before reaching its decision on his final plea for justice. The allegations which he considers to be most serious, with the most long lasting consequences for him and others, however, are the allegations made by the consumers. Consumers were allowed to express any view they desired in this lawsuit as a result of the FTC's upper hand. Now, it's Tom Norton's turn to earn a chance to defend himself.

I. THE FTC'S RELIABLE CONSUMER COMPLAINTS DID NOT ESTABLISH SECTION 45(a) VIOLATIONS.

The appearance of justice is misleading in this case. The FTC was truly superior in every sense of the word. The lower court gave the FTC the lead by dispensing with notice to Tom Norton and an opportunity to be heard on the magistrate's issuance of the temporary restraining order and the appointment of a federal receiver over all corporate assets. The record establishes a knowing and deliberate disregard for a clearly articulated statutory mandate in the Federal Magistrate's Act in going forward in the direction of the FTC without early input on the matter from Tom Norton. The statute mandates notice, not once, but three times. *See* Fed. R. Civ. P. 65(b); 28 U.S.C. § 636(b)(1)(C); 15 U.S.C. § 53(b). Notice was never given. Even where the rule permits a party to dispense with

notice in the issuance of a TRO, the FTC is not given any statutory right, or right established in case law, to elect between the general provisions of the rules of civil procedure, Section 65(b), and the special notice requirements contained in the Act, to wit, 15 U.S.C. § 53(b). *See* Appendix D. Authorization to commerce a civil suit also does not abrogate notice. *See* 15 U.S.C. § 57b(b). Tom Norton is still trying to catch up to the momentum that was lost by this serious breach of law. The FTC not only had restraints on Tom Norton, but the favor of the judge as well.

Still, the record is not barren of all truth. As the foundation for his plea for justice, Tom Norton is entitled to a fair approach to the evidence rather than a view from one side. Fairness means searching for evidence which has the greatest potential for reliability and the least potential for bias, or other influencing factors which have a tendency to distort or exaggerate the materiality or relevance of evidence in one party's favor. Since the FTC presented this case alone, the search involves sifting through its evidence. The list is not that lengthy and consists of the receiver's testimony, the testimony of four consumers, the accountant's testimony, and documentary evidence comprised of 20 declarations signed mostly by consumers, and 18 handwritten consumer complaints.

The receiver's testimony was clearly biased against Tom Norton, contentious, and unreliable. She also lacks personal knowledge of the relevant and material facts, having come on the scene after the FTC initiated this lawsuit.

The testimony from each of the four consumers is burdened with two potential biases. The first is self-interest. The second is limited and/or vague recollection. Considerable time passed between their conversations with the companies and their testimony in which they were called upon to recall those conversations. In the meantime, the FTC intervened to an uncertain extent in preparing these witnesses for trial.

The consumer declarations have an even greater potential for

bias because they were professionally prepared by the FTC attorneys, and such testimony could not be cross-examined.

By process of elimination, therefore, only one form of evidence presented by the FTC had the greatest potential for truth and reliability and the least potential for causing prejudice to Tom Norton under circumstances where he was restrained from presenting a proper defense. The evidence consists of 18 complaints, written by consumers, in their own handwriting, and submitted voluntarily without prompting by the FTC or the receiver. All objections to this evidence are put aside rather than waived and are expressly reserved herein.

To test the reliability of the lower court's findings of fact, all 18 handwritten consumer complaints which were received in evidence by the lower court were reviewed in order to identify and list the true nature of the consumer's actual complaints against the companies. *See* Appendix I.

Well over half of the repeat complaints (11/18) are attributable to distributors who were ignored after they made their initial purchase and given one excuse after another for why their calls were not being returned. Slightly less than half of such complaints (8/18) are attributable to distributors who complained that their territories were not exclusive. Shortages in deliveries accounted for one-third (6/18) of the complaints repeated by distributors. Shortages were cured in many cases. Only 5 out of the 18 distributors mentioned exaggerated sales figures as a reason for their complaint.

Four (4) out of 18 distributors complained about the lack of customer support and/or service. Delays were cited in half of all complaints (9/18) and were broken down evenly between delays in receiving card exchanges (3/18), delays in hearing from the location company (3/18), and delays in making shipments after the initial purchase, *e.g.*, sample cards. Eleven different specific complaints were repeated only twice in all of the complaints. In particular, out of 18 separate complaints, only 2 mentioned that

references were used to corroborate sales pitches concerning potential earnings figures. An equal number of distributors (2/18) complained that they were ignored by the independent location company after the initial selection of accounts.

All of the remaining items consist of complaints that were unique to the individual distributor, *i.e.*, individual problems that were articulated in the distributor's own words which appeared only one time in the survey of all eighteen complaints. There were many unique individual complaints. Three examples are:

- one distributor received his shipment late
- one distributor complained about the quality of the cards
- one distributor was asked by a location company to pay twice

Only one distributor complained that he was promised and did not yield a return on his investment in the first six months. Similarly, only one distributor complained that he allegedly felt pressured into buying the product because a salesman told him that his area would be lost if he did not act right away in making his purchase.

The findings made by the lower court in the final judgment are simply not borne out by the complaints expressed by these 18 consumers in their own handwriting. *See* Appendix C. The most glaring indication of the unreliability in the lower court's findings is the fact that nowhere in the final judgment did the lower court find the most often repeated complaint to be that consumers felt ignored after they made their initial purchase and were given one excuse after another why their calls were not returned. Still, this complaint occurred in only slightly more than half of the handwritten complaints which means that actual complaints varied widely in nature which the study confirms. A remarkable number of unique individual complaints turned up in only 18 consumer

complaints. This means that consumer complaints were spread all over the board when the numbers are extrapolated out to 1,000 consumers. Yet, the lower court made its few and narrow findings applicable in the case of all distributors. Not only did this work an injustice, it grossly over-exaggerated the injury and, consequently, the damages in this case.

This result is most unfortunate and disturbing, yet not surprising. The lower court relied exclusively on the testimony of the FTC's four live witnesses. The problem with relying on these witnesses is that their testimony was tailored by the direct line of questioning by the FTC's attorneys. These witnesses were led to focus on the symptoms of their individual losses rather than on the root causes for their ultimate dissatisfaction. The FTC's attorneys never asked any of these four witnesses whether the real reason they were unhappy was because they felt ignored by the company when they called in for support. The consumers who complained in their own handwriting, on the other hand, wrote about their problem from an independent and personal point of view. Their experiences are more reliable indicators of what problems distributors were having with the companies that sold them their products.

The consumers' handwritten complaints tell us much more than simply problems consumers were experiencing. For example, the handwritten consumer complaints which were received into evidence in this case were generated based on sales occurring during a period of slightly more than a year, between November of 1990 and January of 1992. In every case, the complaint involved Jordan Ashley. This was at a time when Jordan Ashley was still handling its own marketing and distribution. Tom Norton has maintained that Jordan Ashley ceased marketing and distributing its own cards around the end of 1991. These handwritten consumer complaints corroborate his position and provide another reason why he lost a valuable defense in this case.

Similarly, the handwritten complaints disclose that none of

these distributors complained that they were told their purchase price included the services of a location company. This contradicts the lower court's finding that the purchase price for the goods included the services of a location company. Oddly, the testimony of the FTC's four witnesses at trial also does not support the lower court's finding. Unfortunately, the lower court does not explain the basis for this finding.

None of the handwritten complaints articulated specific false assertions made by the marketing representatives concerning the ease of finding locations, suitability of locations, or terms and conditions for replacing locations. Here again, the lower court found that such assertions were made, and that they were false, but how?

A number of handwritten complaints had to do with the location company and/or the locations themselves. Three out of 18 distributors cited delays in hearing from the location company initially. Only two distributors understood from the sales presentation that they were required to use the location company. In one case, an employee working for the location company allegedly forged and cashed the distributor's check, and the location company asked the distributor to replace the stolen funds. One distributor did not recall the salesman mentioning the location company. Another distributor received a call from a second location company wanting to sell additional locations for a fee. One distributor felt it was the location company's job to meet with retail owners and managers concerning problems with an account they helped set up. Another distributor complained that one location was going out of business. One distributor complained because the salesman for the location company was new and inexperienced. In one case, the distributor did not like the locations. In what appears to be a rather unique experience, one distributor complained because the location company could not locate stores within a remote and semi-desolate area in which the distributor was located.

One of these distributors wrote that he was informed by the marketing representative that there were no other distributors in

his area. This is not the same as promising a distributor an exclusive territory. This distinction, also, was not brought out at the trial.

Less than half of the handwritten complaints were from consumers who complained that their territories were nonexclusive. The lower court, on the other hand, found that *all* distributors were orally assured of getting an exclusive territory. There is on this record a transcript of a tape-recorded sales presentation during a conversation between the FTC investigator and Gold Coast's marketing representative, Jim Peragine. The conversation occurred three months before the FTC initiated this case. Nowhere in Mr. Peragine's sales presentation to the FTC's undercover agent did he refer to the territory or market as exclusive. In fact, he told the agent that the likelihood existed there would be at least 3 distributors in the territory under discussion at the time. This transcript casts doubt on the reasonable expectations of distributors who complained about not getting an exclusive territory. A fair court would take this evidence into consideration if it found Tom Norton liable for promising distributors exclusive territories.

According to the declaration of the FTC's undercover investigator, the evidence which the FTC attempted to develop concerning the authenticity of the references that were supplied to potential distributors was inconclusive and required further development. Yet, the lower court, relying instead on the FTC's witnesses at trial, found that Tom Norton misrepresented the authenticity of references that were used in the sale of goods.

At one point in the judgment, the lower court concluded that misrepresentations to the public were central to the success of the business, and for this reason Tom Norton must have been aware of them. This statement is utterly ludicrous. Tom Norton went to great trouble and expense establishing both Jordan Ashley and Gold Coast, including the inventory of paintings and sculptures. The Hatchery was a profitable new business which also required a substantial investment of both time and money to succeed. It defies common reasoning to suggest that Tom would deliberately

jeopardize himself or any of the businesses. The point also completely ignores Tom Norton's successful past in vending and other pursuits.

II. JORDAN ASHLEY, GOLD COAST, AND NATIONAL VENDING WERE NOT FRANCHISES BECAUSE THEY DID NOT OFFER "SIGNIFICANT SERVICES", OR PROVIDE RETAIL LOCATION SERVICES, OR CONDITION GOODS UPON A FRANCHISE FEE.

The foregoing analysis of the reliable consumer complaints put forth as evidence in the FTC's case establishes that the greeting card companies did not provide "significant assistance" as that term has been defined and interpreted. *See* 16 C.F.R. § 436.2(a)(1)(i)(B)(2); *Garcia Marketing*, Bus. Franchise Guide (CCH) ¶ 6415 at 9583 (May 29, 1980). The lower court's findings that distributors were required to use the services of a location company are just simply not borne out by the statistical consumer complaints. In fact, as shown in the appendix, only 2 out of 18 complainants stated the belief (but not the representation) that they were required to use the services of the independent location company. More telling are those consumers who felt that they had been ignored (11 out of 18), or that there was no customer support or service (4 out of 18). In other words the absence of "significant assistance" gave rise to more than half of the complaints.

Similarly, the lower court based its judgment under the alternative definition of a francise on the "fact" that distributors were required to use the services of a location company. *See* 16 C.F.R. § 436.2(a)(1)(ii)(B)(3). The reliable consumer complaints, however, clearly demonstrate that the greeting card companies did not insist on using the services of a location company. The most that can be said is that 2 in every 18 complainants felt obligated to do business with the location company.

The greeting card companies, Jordan Ashley and Gold Coast, did not require franchise fees. The FTC's own transcript

of the tape-recorded sales presentation by Jim Peragine to the FTC's undercover investigator shows that what the marketing representative told consumers was that distributorships were not franchises. Comparisons were made time and time again, and up front franchise fees were specifically addressed and dismissed as not applicable here.

At one point in the judgment, the lower court concluded that misrepresentations to the public were central to the success of the business, and for this reason Tom Norton must have been aware of them. This statement is utterly ludicrous. Tom Norton went to great trouble and expense establishing both Jordan Ashley and Gold Coast, including the inventory of paintings and sculptures. The Hatchery was a profitable new business which also required a substantial investment of both time and money to succeed. It defies common reasoning to suggest that Tom would deliberately jeopardize himself or any of the businesses. The point also completely ignores Tom Norton's successful past in vending and other pursuits.

III. DUE PROCESS REQUIRES THAT A PARTY HAVE A FULL AND FAIR OPPORTUNITY TO PRESENT HIS CASE TO AN IMPARTIAL COURT.

As elemental as it may appear, Tom Norton and other parties did not have a full and fair opportunity to prepare his case, and then present it to a fair and impartial decision-maker. *See United States v. Monsanto*, 491 U.S. 600 (1989). The restraints imposed upon Tom Norton is one factual reason why. Here are some of the additional legal reasons:

1. The TRO did not comply with three separate notice statutes, to wit, Fed. R. Civ. P. 65(b); 28 U.S.C. § 636(b)(1)(C); and 15 U.S.C. § 53(b). It did not comply because Tom Norton was not given notice of the restraints imposed upon him, and he did not appear, or have the opportunity to appear, before the lower court in opposition to all or any restraints.

2. Total restraints against payment of a litigant's attorneys' fees are permanent deprivations. *See United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988).

3. The seizure and ouster of Patricia Riley from her condominium was unconstitutional because she was not given a pre-seizure, or a prompt post-seizure, hearing within the meaning of this Court's definition of such terms. *See United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). The December 15, 1993 hearing, and the trial and the July 1994 proceeding so far departed from the normal course of proceedings, the seizure of the condominium and voiding of the deed will not withstand scrutiny under the *James Daniel Good* analysis as applied to the circumstances of this case.

The relief ordered in this case is widely out of proportion to the reliable evidence in this case and the harm to the public, and needs the Court's supervision at this time.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 10, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4623

LINDA L. CARROLL,

Receiver-Appellee,

FEDERAL TRADE COMMISSION

Plaintiff-Counter-
Defendant-Appellee,

versus

JORDAN ASHLEY, INC., a Florida Corporation
d.b.a. Jordan Ashley Galleries;
d.b.a. Jordan Ashley Publishing;
d.b.a. American Heartbeats;
d.b.a. American Celebrations,

GOLD COAST DEVELOPERS, INC., a Florida Corporation,

NATIONAL VENDING SYSTEMS, LTD., INC., a Florida Corporation,

Defendants-Appellants,

Appendix A

CHRISTINE M. HELLER, individually and as an officer and director of one or more of the above corporations,

KELLI J. BLASI, individually and as an officer and director of one or more of the above corporations,

Defendants,

THOMAS P. NORTON, individually and as an officer and director of one or more of the above corporations,

Defendant-Counter-Claimant-Appellant,

BUCHANAN INGERSOLL PROFESSIONAL CORPORATION, et. al.,

Movants,

PATRICIA RILEY,

Movant-Appellant.

No. 94-4840

LINDA L. CARROLL,

Receiver-Appellee,

FEDERAL TRADE COMMISSION,

Plaintiff-Counter-Defendant-Appellee,

Appendix A

versus

JORDAN ASHLEY, INC., a Florida Corporation
d.b.a. Jordan Ashley Galleries;
d.b.a. Jordan Ashley Publishing;
d.b.a. American Heartbeats;
d.b.a. American Celebrations,

GOLD COAST DEVELOPERS, INC., a Florida Corporation,

NATIONAL VENDING SYSTEMS, LTD., INC., a Florida Corporation,

CHRISTINE M. HELLER, individually and as an officer and director of one or more of the above corporations,

KELLI J. BLASI, individually and as an officer and director of one or more of the above corporations,

Defendants,

THOMAS P. NORTON, individually and as an officer and director of one or more of the above corporations,

Defendant-Counter-Claimant,

BUCHANAN INGERSOLL PROFESSIONAL CORPORATION, et al.,

Movants,

Appendix A

PATRICIA RILEY,

Movant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: EDMONDSON, Circuit Judge, FAY, Senior Circuit Judge, and ALDRICH*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6.95)

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* Honorable Ann Aldrich, Senior U.S. District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 29, 1996

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4623

D.C. Docket No. 93-2257-CIV-Nesbitt

LINDA L. CARROLL,

Receiver-Appellee,

FEDERAL TRADE COMMISSION,

Plaintiff-Counter-
Defendant-Appellee,

versus

JORDAN ASHLEY, INC., a Florida Corporation d.b.a. Jordan Ashley Galleries d.b.a. Jordan Ashley Publishing, d.b.a. American Heartbeats, d.b.a. American Celebrations, GOLD COAST DEVELOPERS, INC., a Florida Corporation, NATIONAL VENDING SYSTEMS, LTD., INC., a Florida Corporation,

Defendants-Appellants,

Appendix B

CHRISTINE M. HELLER, individually and as an officer and director of one or more of the above corporations, KELLI J. BLASI, individually and as an officer and director of one or more of the above corporations,

Defendants,

THOMAS P. NORTON, individually and as an officer and director of one or more of the above corporations,

Defendant-Counter-Claimant-Appellant,

BUCHANAN INGERSOLL PROFESSIONAL CORPORATION, et. al.,

Movants,

PATRICIA RILEY,

Movant-Appellant.

No. 94-4840

D.C. Docket No. 93-2257-CIV-NESBITT

LINDA L. CARROLL,

Receiver-Appellee,

FEDERAL TRADE COMMISSION,

Plaintiff-Counter-Defendant-Appellee,

Appendix B

versus

JORDAN ASHLEY, INC., a Florida Corporation d.b.a. Jordan Ashley Galleries d.b.a. Jordan Ashley Publishing d.b.a. American Heartbeats, d.b.a. American Celebrations, GOLD COAST DEVELOPERS, INC., a Florida Corporation, NATIONAL VENDING SYSTEMS, LTD., INC., a Florida Corporation, CHRISTINE M. HELLER, individually and as an officer and director of one or more of the above corporations, KELLI J. BLASI, individually and as an officer and director of one or more of the above corporations,

Defendants,

THOMAS P. NORTON, individually and as an officer and director of one or more of the above corporations,

Defendant-Counter-Claimant,

BUCHANAN INGERSOLL PROFESSIONAL CORPORATION, et al.,

Movants,

PATRICIA RILEY,

Movant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

(October 29, 1996)

Appendix B

Before EDMONDSON, Circuit Judge, FAY, Senior Circuit Judge, and ALDRICH*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Circuit Rule 36-1.

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* Honorable Ann Aldrich, Senior U.S. District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX C — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED APRIL 5, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-2257-CIV-NESBITT

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

JORDAN ASHLEY, INC., et al.,

Defendants.

FINAL JUDGMENT

In accordance with the Court's Order of April 4, 1994, Final Judgment is hereby entered in favor of Plaintiff the Federal Trade Commission ("the FTC") on the terms specified in the April 4, 1994 Order.

DONE and ORDERED, in chambers, Miami, Florida, this 5th day of April 1994.

s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc:
Richard Quaresima, Esq.
Linda L. Carroll, Esq.
Steven Saber, Esq.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-2257-CIV-NESBITT

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

JORDAN ASHLEY, INC., et al.,

Defendants.

ORDER

This cause was tried before the Court on March 8 and 14, 1994. The case involves a request by Plaintiff the Federal Trade Commission ("FTC") for a permanent injunction and other relief against Defendants Jordan Ashley, Inc. ("Jordan Ashley"); Gold Coast Developers, Inc. ("Gold Coast"); National Vending Systems, Ltd., Inc. ("National Vending"); Christine Heller ("Heller"); Kelli Blasi ("Blasi"); and Thomas P. Norton ("Norton"), pursuant to section 13(b) and 19(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b(a).

Upon motion by the FTC, the Court issued an *Ex Parte* Temporary Restraining Order on December 6, 1993. In the Order, the Court appointed Ms. Linda L. Carroll, Esq. as temporary receiver for Jordan Ashley, Gold Coast, and National Vending (collectively "the Corporate Defendants"), froze the assets of

all Defendants, and ordered Defendants to show cause why a preliminary injunction should not issue. In an Order issued January 4, 1994, the Court consolidated the hearing on the preliminary injunction with the trial on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. The Court's findings follow.

FINDINGS OF FACT

Defendants have been engaged in the marketing and sale of business opportunities to the public since at least September 1990. These opportunities involve the sale of greeting cards through use of display racks placed in shopping malls and stores engaged in retail selling.

It is undisputed that the individual Defendants are officers and directors in the various Corporate Defendants. Moreover, the evidence reveals that no real distinction existed between the Corporate Defendants. The temporary receiver testified that she seized and secured the business premises of the Corporate Defendants on December 8, 1993 pursuant to her authority as receiver. Her review of the documents she found on the premises indicate that the Corporate Defendants failed to segregate payment of bills. The telephone bills for all of the corporate offices, for example, were held in the name of National Vending. Further, despite the fact that each corporation leased distinct space within the corporate building, rental payments were made exclusively out of Gold Coast's accounts. In addition, the receiver found numerous files containing documents from several, or all, of those Defendants. Documents pertaining to the Corporate Defendants were intermingled throughout these files.

Appendix C

There is nothing to rebut any of this evidence. There is no evidence indicating, for instance, that the Corporate Defendants observed corporate formalities, nor that they performed distinct functions. The Court concludes that all of these Defendants engaged in misrepresentations described below.

The FTC's evidence of these misrepresentations consisted the testimony of four witnesses, whose experiences with Defendants are characteristic of those who purchased Defendants' business opportunities. This testimony established that many prospective investors learned about Defendants' business opportunities through radio and newspaper advertisements. Typically, investors then contacted the 800 number referenced in the advertisements and spoke with one of Defendants' representatives. In both the initial conversation and in subsequent conversations, the representative would typically explain that: 1) an investor could expect to make substantial sums through the purchase of a distributorship, often up to $50,000 per year; 2) an investor could expect to recoup his or her initial investment quickly, usually within six months at the latest; 3) an investor could expect to sell a large number of cards at each location, usually between 200 to 400 cards per month per location; and 4) each investor would operate as Defendants' exclusive distributor within a particular territory, but had to act quickly in order to secure these exclusive rights[1].

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1. Several witnesses testified that they received a brochure from Gold Coast outlining the distributorship. The brochure includes at least one graphic containing estimated sales and earnings figures for new distributorships. These figures are consistent with the figures which Defendants' representatives orally communicated to the witnesses.

At the bottom of the graphic, however, the brochure indicates that the figures are just estimates, not guarantees, and that Gold Coast offers no (Cont'd)

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The representatives also assured the investors that a "professional locating company" familiar with each investor's region of the country would find retail outlets suitable for card sales and willing to accept card display racks. In most instances, the representatives insisted that the investors rely initially on the locating company and defer selecting locations without assistance until after acquiring some familiarity with the retail cards sale business. The representatives explained, however, that the locating company would find new locations to replace any that proved to be unsatisfactory. The representatives also supplied the investors with the names of other individuals whom they identified as successful distributors. These references confirmed the representatives' statements.

Virtually all of these statements later proved to be false. After agreeing to purchase a distributorship, the investors typically made a non-refundable payment of between $5,000 and $15,000 to one of the Corporate Defendants. The payment generally covered ten card racks, an initial set of cards, and the services of the locating company. The locating company, however, usually failed to secure locations for all of the card racks. Those that the locating company did select were often

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(Cont'd)
guarantees concerning either earnings or sales volume. Similar language appears on the purchase order the investors used to purchase the distributorships and on a document entitled "Terms, Conditions And Purchaser's Request For Referral To Professional Marketing Company." The brochure includes both documents.

Despite these disclaimers, the witnesses all stated that Defendants' representatives assured them that they would achieve sales and income figures approximating those listed in the graphic and stated that they based their decisions to purchase on these assurances.

totally inadequate. The locating company proved to be unwilling, or unable, to find replacement locations. Many investors also discovered other distributors in the area in which the investors had been promised exclusive distribution rights. All investors who testified experienced sales volume and earnings far below the estimates made by the representatives.

LEGAL CONCLUSIONS

The FTC contends that the conduct outlined above violates both 15 U.S.C. § 45(a) and the "franchise rule", 16 C.F.R. § 436.1. The Court will examine each of these contentions separately.

1) 15 U.S.C. § 45(a)

Section 45(a) provides that:

15 U.S.C. § 45(a) provides, in pertinent part, that:

> (1) Unfair methods of competition in or affecting commerce, and unfair or *deceptive acts or practices in or affecting commerce, are declared unlawful.*
>
> (2) *The (Federal Trade) Commission is empowered and directed to prevent persons, partnerships, or corporations .... from using* unfair methods of competition in or affecting commerce and unfair or *deceptive acts or practices in or affecting commerce.* (emphasis added).

In order to find the Corporate Defendants liable under this section, the Court must find that those Defendants made material misrepresentations or omissions in connection with the sale of

the distributorships and that consumer injury resulted. *See F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). A representation or omission is material if of the kind usually relied on by a reasonably prudent person. *Id.*

There is no question that the Corporate Defendants made such misrepresentations. As discussed above, representatives of the Corporate Defendants misrepresented the earnings potential of the distributorships; the sales volume likely to be achieved; the authenticity of references supplied; the exclusivity of, or amount of competition within, the purchaser's geographic territory; the ease with which the locating company could find sales locations; the suitability of those locations; and the terms and conditions governing replacement of unprofitable locations. Each of these misrepresentations is material.

There is also no question that these misrepresentations resulted in consumer injury. The FTC's consumer witnesses all testified that several, or all, of these misrepresentations induced them to purchase distributorships and that they failed to recoup their initial investments despite good faith efforts to operate their distributorships. The legion of complaint letters filed with the FTC indicate that numerous other distributorship purchasers experienced similar losses[2]. *See* Plaintiff's Exhibit 130.

The evidence concerning misrepresentations and consumer injury is sufficient to render the Corporate Defendants liable. Once corporate liability is established, the FTC must satisfy

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2. In an Order dated March 7, 1994, the Court granted by default the FTC's Motion In Limine For Admission Of Declarations And Consumer Letters. The motion sought admission of the consumer declarations and letters pursuant to the residual exception to the hearsay set out in Rule 803(24) and 804(b)(5) of the Federal Rules of Evidence.

two additional criteria in order to establish that the individual Defendants are liable. First, the FTC must demonstrate that the individual Defendants participated directly in the wrongful practices or acts or that the individual Defendants had authority to control them. *Amy Travel Service,* 875 F.2d at 573. Second, the FTC must demonstrate that the individual Defendants had some knowledge of the wrongful acts or practices. *Id.* The FTC need not demonstrate, however, that the individual Defendants possessed the intent to defraud. *Id.* at 573-74.

In the present case, it is clear that all three individual Defendants exercised control over the Corporate Defendants. Norton admits that he controlled the Corporate Defendants. Blasi and Heller served as officers in the corporations. Moreover, correspondence prepared by Heller and Blasi indicates that Heller and Blasi were actively involved in the operation of the business of the Corporate Defendants. *See* Plaintiff's Exhibits 110, 114.

The same correspondence indicates that both Blasi and Heller were aware of the misrepresentations being made in the names of the Corporate Defendants. While there is no such direct evidence indicating that Norton knew about these misrepresentations, it is simply not plausible to suppose that he did not know. He actively participated in the business of the Corporate Defendants and admits that he controlled them. The making of the misrepresentations at issue formed a central part of that business and contributed greatly to its success. Given the importance of the misrepresentations, and the level of Norton's participation, Norton must have been aware that the misrepresentations were being made. The Court concludes that Norton, Heller, and Blasi controlled the Corporate Defendants and that they knew about the misrepresentations being made in the names of the Corporate Defendants.

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2) The Franchise Rule

The FTC also contends that Defendants violated the franchise rule, set out in 16 C.F.R. § 436.1[3]. The rule requires a franchisor to provide prospective franchisees with a complete and accurate disclosure containing twenty categories of information about the history of the franchisor and the terms and conditions under which the franchise operates. *See* 16 C.F.R. § 436.1(a)(1)-(a)(20). The rule also requires the franchisor to have a reasonable basis for any oral, written, or visual representations made to a prospective franchisee concerning earnings or profits the franchisee should expect from the franchise; to provide the prospective franchisee with documents substantiating these representations; to disclose the material basis for these representations; and to include a warning that the representations constitute only an estimate, not a guarantee. *See id.* at §§ 436.1(b)(2), (c)(2), (e)(1), (e)(3)(4). Defendants do not dispute that they failed to comply with the requirements of the franchise rule. They contend that they need not have complied, however, because they were not selling franchises within the meaning of the rule. The term "franchise" is defined extensively in section 436.2(a). In order to demonstrate that Defendants' business ventures were franchises within the meaning of this section, the FTC must demonstrate that the ventures: 1) satisfy the requirements of either section

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3. The Court notes that a violation of the franchise rule constitutes a violation of 15 U.S.C. § 45(a). 15 U.S.C. § 57a(a)(1)(B) provides the FTC with authority to promulgate rules which define with specificity acts or practices which are unfair or deceptive within the meaning of section 45(a). The franchise rule represents an exercise by the FTC of that authority. 15 U.S.C. § 57a(d)(3) provides that a violation of a rule promulgated pursuant to section 57a(a)(1)(B), like the franchise rule, constitutes a violation of the prohibition against deceptive and unfair trade practices in section 45(a).

436.2(a)(1)(i) or section 436.2(a)(1)(ii); 2) satisfy the requirement set out in 436.2(a)(2); and 3) do not fall within any of the exemptions or exclusions set out in sections 436.2(a)(3) or 436.2(a)(4), respectively.

The record contains evidence sufficient to satisfy both sections 436.2(a)(1)(i) and 436.2(a)(1)(ii). Under section 436.2(a)(1)(i), a franchise is, among other things, a commercial relationship created by an arrangement in which: 1) the alleged franchisee sells goods, commodities, or services; 2) to any person other than the alleged franchisor; 3) where the goods, commodities, or services are identified by the service mark, trade mark, or advertising or other commercial symbol of the alleged franchisor; and 4) where the alleged franchisor gives significant assistance to the alleged franchisee in the latter's method of operation, including, but not limited to, the alleged franchisee's business organization, management, marketing plan, promotional activities, or business affairs. 16 C.F.R. § 436.2(a)(1).

In the present case, all four of the FTC's consumer witnesses testified that they purchased greeting cards and card racks from Defendants and that they sold these cards to members of the general public besides Defendants. Moreover, all four of the witnesses stated that the cards included in the sample pact produced as part of Defendants' exhibit 5 were characteristic of the cards that they received from Defendants and thereafter sold. The cards in the sample pack bear the trademark "American Heart Beats" and indicate that the trademark is held by Jordan Ashley Galleries, Inc. Each cards also contain the phrases "By Jordan Ashley Publishing" and "Produced Gold Coast Developers, Inc.". The cards thus bore the trade marks, service marks, etc. of the Corporate Defendants.

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Further, it is clear that Defendants gave purchasers substantial assistance in operating their distributorships. Several of the consumer witnesses testified that Defendants' representatives required them to utilize the services of a professional locating company to select the initial locations for their card racks, explained to them the likely extent of their responsibilities with respect to the actual sale of the cards, offered them tips on how to arrange the cards in order to maximize sales, explained how to deal with the owner/managers of the stores in which the racks were to be placed, and promised them that the locating company would find alternative locations in the event that the locations initially chosen proved to be unsatisfactory. This assistance qualifies as substantial under section 436.2(a)(1)(B)(2).

It is also clear that Defendants' ventures satisfy the requirements of section 436.2(a)(2)(a)(ii). Under that section, a franchise is any continuing commercial relationship in which: 1) the alleged franchisee sells goods, commodities, or services; 2) to any person other than the alleged franchisor; 3) where the goods, services, or commodities sold are supplied by the alleged franchisor; and 4) where the alleged franchisor supplies to the alleged franchisee the services of a person able to provide locations for rack displays. The Court finds that the first two requirements are met for the reasons specified above. Further, the third and fourth requirements are also met. All four of the FTC's consumer witnesses testified that they sold cards purchased from Defendants and that Defendants insisted that they use a professional locating company specified by Defendants in order to select the locations for their rack displays.

The Court also finds that the remaining two elements of the definition of "franchise" in section 436.2(a) are met. Under

section 436.2(a)(2), a business arrangement only qualifies as a franchise if the alleged franchisee is required to make a payment to, or a commitment to pay, the alleged franchisor as a condition of obtaining or commencing the franchise operation. Section 436.2(a)(3)(iii), the payment amount must equal or exceed $500.

In the present case, all of the FTC's consumer witnesses testified that Defendants required them to make payments of between $5,000 and $15,000 in order to acquire their initial sets of racks and cards, without which they could not have commenced operation of their card distributorships. This requirement thus served as "a condition of . . . commencing the franchise operation" and therefore satisfies section 436.2(a)(2).

Sections 436.2(a)(3) and 436.2(a)(4) set out the exemptions and exclusions to the franchise rule. A review of those exemptions and exclusions reveals that none are applicable to this case.

Based on the foregoing, the Court concludes that the business ventures sold by Defendants are franchises within the meaning of the franchise rule. As Defendants concede that they did not comply with the substantive provisions of the rule, the Court concludes that Defendants have violated the rule.

RELIEF ORDERED

I.

IT IS THEREFORE ORDERED that Norton is hereby permanently restrained and enjoyed from engaging, participating or assisting in any manner or in any capacity whatsoever in the marketing or sale of any franchise or business venture, whether directly or through any intermediary.

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IT IS FURTHER ORDERED that Norton is hereby permanently restrained and enjoined from engaging or participating, whether directly or in concert with others, or through any business entity or device, in the business of telemarketing without first obtaining a performance bond. The principle sum of said bond shall be in the amount of $5,000,000 (five million dollars).

A. The performance bond shall be an insurance agreement pledging surety for financial loss issued by a surety company that is admitted to do business in each state in which any bonded defendant does business and that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring. The performance bond shall cite this Permanent Injunction as the subject matter of the bond and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 or to the provisions of this Permanent Injunction. Such performance bond shall be executed in favor of both (1) the Federal Trade Commission for the benefit of any person injured as a result of any false or misleading representation of material fact made by the defendant while engaged in the business of telemarketing, and (2) any consumer so injured;

B. The bond shall be deemed continuous and remain in full force and effect as long as Norton continues to engage or participate in telemarketing and for at least three years after Norton has ceased to engage or participate in telemarketing;

C. The bond required by this Paragraph is in addition to, and not in lieu of, any other bond required by federal, state, or local law;

D. Norton shall provide a copy of the bond required by this paragraph to the Associate Director for Marketing Practices at the address specified in Paragraph XVII, at least ten days before commencing the business of telemarketing;

E. The FTC may execute against the performance bond if it demonstrates to this Court, by a preponderance of the evidence, that after the effective date of this Order, the bonded Defendant, while engaging or participating in the business of telemarketing, made any false or misleading representation of material fact, directly or by implication, prohibited by Section 5 of the FTC Act or the provisions of this Permanent Injunction.

F. Proceedings instituted under this section are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings the FTC may initiate to enforce this Order.

II.

IT IS FURTHER ORDERED that, in connection with the offering for sale or sale of any franchise or business venture, Heller and Blasi are hereby permanently restrained and enjoined from:

A. Misrepresenting, either orally or in writing, to any potential investor of a franchise or business venture, any material fact, including, but not limited to the following:

1. the income, profits or sales volume likely to be achieved;

2. the income, profits or sales volume achieved by other business venture purchasers;

3. the authenticity of any reference;

4. the territorial rights to, or amount of competition within, any geographic territory;

5. the existence of pre-selected locations for display racks for defendants' products;

6. the terms and conditions for replacing unprofitable locations; and

B. Violating or assisting others to violate any provision of the Franchise Rule, 16 C.F.R. Part 436, including but not limited to:

1. failing to provide potential franchisees with a complete and accurate disclosure document within the times stated in the Franchise Rule, 16 C.F.R. § 436.1(a);

2. failing to have a reasonable basis for any earnings claim at the time such claim is made, as required by the Franchise Rule, 16 C.F.R. § 436.1(b)(e); and

3. failing to disclose, in immediate conjunction with any mass advertised earnings claim, the material basis for the claim (or the lack of such basis) and a warning that the earnings claim is only an estimate, as required by the Franchise Rule, 16 C.F.R. § 436.1(e)(3)-(4).

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III.

IT IS FURTHER ORDERED that judgment is entered in favor of the FTC against the corporate and individual defendants, jointly and severally, in the amount of $9,165,567 (Nine Million, One Hundred Sixty-five Thousand, Five Hundred Sixty-seven Dollars). The receiver appointed by paragraph IV of this Order is also appointed as agent of the FTC for the sole purpose of collecting this judgment and for formulating and implementing a redress plan. Any monies collected by the receiver will be used to create a redress fund. This redress fund shall be used to provide restitution for investors who purchased greeting card business opportunities from the defendants. The redress fund shall also be used to pay administrative costs associated with providing such redress.

IV.

IT IS FURTHER ORDERED that Linda L. Carroll shall continue as permanent receiver with the full power of an equity receiver, for the Corporate Defendants, and their affiliates and subsidiaries (including but not limited to Red Lion Seafood, Inc., d/b/a Red Lion Ostrich Hatchery, Inc. ("Red Lion")) and of all the funds, properties, premises, accounts and other assets directly or indirectly owned, beneficially or otherwise, by the Corporate Defendants. The receiver shall:

A. Assume full control of the Corporate Defendants by removing Defendants Heller, Blasi, and Norton, and any other officer, independent contractor, employee, or agent of any of the Corporate Defendants, from control and management of the affairs of the Corporate Defendants.

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B. Take custody, control and possession of all the funds, property, premises, mail and other assets of, or in the possession or under the control of, the Corporate Defendants, wherever situated. The receiver has full power to sue for, collect, receive and take in possession all goods, chattels, rights, credits, moneys, effects, lands, leases, books and records, work papers, and records of accounts, including computer-maintained information, and other papers and documents of the Corporate Defendants and business venture purchasers whose interests are now held by or under the direction, possession, custody or control of the Corporate Defendants. The receiver has discretion to determine that certain personal property or other assets of the individual Defendants shall be under the receiver's control, but shall remain in the possession or custody of an individual Defendant;

C. Conserve, hold and manage all receivership assets, and perform all acts necessary to preserve the value of those assets in order to prevent any irreparable loss, damage and injury to business venture purchasers;

D. Prevent the withdrawal or misapplication of funds belonging or entrusted to the Corporate Defendants and to obtain an accounting thereof;

E. Protect the interests of business venture purchasers;

F. Manage and administer the business of the Corporate Defendants until further order of this Court, by performing all acts necessary or incidental thereto. This includes hiring or dismissing all personnel the receiver deems appropriate;

G. Disburse funds that the receiver deems necessary and advisable to preserve the properties of the Corporate Defendants or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Order;

H. Collect any monies owed the Corporate Defendants;

I. Institute, compromise, adjust, intervene in or become party to such actions or proceedings in state, federal or foreign courts that the receiver deems necessary and advisable to preserve or augment the properties of the Corporate Defendants or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Order. The receiver has the authority to bring suit for recovery of assets of the receivership estate against all parties to whom assets may have been fraudulently transferred;

J. Institute, compromise, adjust, intervene in or become party to such actions or proceedings in state, federal or foreign courts, as the receiver deems necessary, against any and all individuals or entities who may be liable for or who assisted the Corporate Defendants in the activities set forth in the FTC's complaint and for which the Corporate Defendants are now found to be liable for or who assisted the Corporate Defendants in the activities set forth in the FTC's Complaint and for which the Corporate Defendants are now found to be liable in the sum of $9,165,567 (Nine Million Five Hundred thousand Dollars);

K. Defend, compromise or adjust or otherwise dispose

of any or all actions or proceedings instituted against the Corporate Defendants that the receiver deems necessary and advisable to preserve the properties of the Corporate Defendants or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Order;

L. Liquidate all assets of the Corporate Defendants, and all assets transferred to the receiver in accordance with the terms of this Order;

M. Formulate a plan for distribution of the assets of the Corporate Defendants, pursuant to Paragraph III of this Order, to purchasers of the defendants' franchises or business ventures and to administer the distribution of such assets pursuant to further order of this Court; and

N. Execute all bills of sale and deeds to personal and real property belonging to or coming into possession of the Corporate Defendants.

V.

IT IS FURTHER ORDERED that, in light of the appointment of a receiver herein, the Corporate Defendants are hereby prohibited from filing a petition for relief under the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, without prior permission from this Court.

VI.

IT IS FURTHER ORDERED that the receiver and all

personnel hired by the receiver as herein authorized, shall be compensated for the services they render to the receivership estate during the pendency of the case. Prior to paying any compensation, the receiver shall file a request with the Court, outlining the services rendered and the related fees and expenses. The receiver shall not pay any compensation except upon order of the Court.

VII.

IT IS FURTHER ORDERED that Norton will immediately cause to be transferred to the receiver all control, right, title and interest to all real and personal property and causes of action now in the custody or control of the receiver, (including property in the custody of the receiver pursuant to this Court's previous Order on December 20, 1993, a copy of which is attached to this Order as Exhibit B). This provision applies to, but is not limited to 1) the following: condominium unit number 2503, One Island Place Condominium II, 3801 N.E. 207th Street, North Miami Beach, Florida 33180; 2) all interest held by Norton or his wife, Patricia Riley Norton ("Riley"), in Red Lion; 3) all stock or ownership interest in the Corporate Defendants.

VIII.

IT IS FURTHER ORDERED that Defendants are hereby permanently restrained and enjoined from providing to any person, except agents of the FTC, the receiver or other law enforcement authorities, the name, address, telephone number, or credit card or bank account number, of any person who purchased a franchise or business venture from any of the Defendants.

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IX.

IT IS FURTHER ORDERED during the pendency of the receivership ordered herein, Defendants and all customers, principals, investors, creditors, stockholders, lessors, and other persons, seeking to establish or enforce any claim, right or interest against or on behalf of any of the Corporate Defendants, or any of their subsidiaries or affiliates, and all others acting for or on behalf of such persons, including attorneys, trustees, agents, sheriffs, constables, marshals, and other officers and their deputies, and their respective attorneys, servants, agents and employees be and are hereby stayed from:

A. Commencing, prosecuting, continuing or enforcing any suit or proceeding against any of the Corporate Defendants, or any of their subsidiaries or affiliates, except that such actions may be filed to toll any applicable statute of limitations;

B. Commencing, prosecuting, continuing or entering any suit or proceeding in the name of or on behalf of any of the Corporate Defendants, or any of their subsidiaries or affiliates;

C. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of, a property of any of the Corporate Defendants, or any of their subsidiaries or affiliates or any property claimed by any of them or attempting to foreclose, forfeit, alter or terminate any of the Corporate Defendants' interests in property, whether such acts are part of a judicial proceeding or otherwise;

D. Using self-help or executing or issuing, or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property, wheresoever located, owned by or in the possession of any of the Corporate Defendants, or any of their subsidiaries or affiliates, or the receiver appointed pursuant to this Permanent Injunction or any agent appointed by said receiver; and

E. Doing any act or thing whatsoever to interfere with the receiver taking control, possession or management of the property subject to this receivership, or to in any way interfere with the receiver, or to harass or interfere with the duties of the receiver; or to interfere in any manner with the exclusive jurisdiction of this Court over the property and assets of the Corporate Defendants, or their subsidiaries or affiliates.

X.

IT IS FURTHER ORDERED that, immediately upon service of this Order upon them, if they have not done so already, Defendants shall transfer control of the following to the receiver; (1) all funds, assets, property owned beneficially or otherwise, and all other assets, wherever situated, of the Corporate Defendants; (2) all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title document and other papers or records, in any form or however maintained, of the Corporate Defendants; and (3) all funds and other assets belonging to members of the public now held by the Corporate Defendants.

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XI.

IT IS FURTHER ORDERED that Defendants shall fully cooperate with and assist the receiver appointed in this action. Defendants are hereby permanently restrained and enjoined from, directly or indirectly, hindering or obstructing the receiver in any manner.

XII.

IT IS FURTHER ORDERED that all banks, brokers, savings and loans escrow agents, title companies, other financial institutions or any other persons or entities which are served with a copy of this Order, shall cooperate with all reasonable requests of the permanent receiver relating to implementation of this Order, including transferring funds at the receiver's direction, allowing the receiver access to safe deposit boxes, and producing records related to Defendants' accounts.

XIII.

IT IS FURTHER ORDERED that the receiver shall maintain the bond previously filed with the Clerk of this Court in the sum of $3,500 with sureties to be approved by the Court, conditioned that the receiver will well and truly perform the duties of her office and duly account for all monies and properties which may come into her hands and abide by and perform all things which she shall be directed to do.

XIV.

IT IS FURTHER ORDERED that, in order to facilitate the Commission's monitoring of compliance with the provisions

of this Permanent Injunction, the individual defendants shall each, for five years after the date of entry of this Order:

A. Notify the FTC in writing, within thirty days after service of this Order, of his or her current residence address and employment status, including the name and business address of his or her current employer(s), if any;

B. Notify the FTC in writing thirty days of any change in his or her residential address. Such notification shall include the Defendant's new address and telephone number;

C. Notify the FTC in writing within thirty days of any change in his or her employment status; such notice shall include the name, address and telephone number of the Defendant's new employer, a statement of the nature of his business, and a statement of the Defendant's duties and responsibilities in connection with the business;

D. Notify the FTC in writing at least thirty days prior to the effective date of any proposed change in the structure of any business entity owned or controlled by any Defendant, such as creation, incorporation, dissolution, assignment, sale, creation or dissolution of subsidiaries, or any other changes that may affect compliance obligations arising out of this Order;

E. After receiving reasonable notice from the FTC, permit duly authorized representatives of the FTC access during normal business hours to the offices of any company or any person under any Defendants' control, to inspect and copy all documents belonging to any individual Defendant and all documents of any company owned or controlled by either

of them, in whole or in part, relating in any way to any conduct subject to this Order;

F. Refrain from interfering with duly authorized representatives of the FTC who wish to interview and Defendants' employers, agents, and employees (who may have counsel present) relating in any way to any conduct subject to this Order;

G. Upon written request by any duly authorized representative of the FTC, submit written reports (under oath, if requested) and produce documents on thirty days notice with respect to any conduct subject to this Order; and

H. Appear on fifteen days notice for deposition with respect to any conduct subject to this Order.

Provided further, that the FTC may otherwise monitor Defendants' compliance with this Order by all lawful means available, including the use of investigators posing as consumers, potential investors, supplies and other entities.

XV.

IT IS FURTHER ORDERED that Defendants shall, within sixty-days after date of entry of this Order, file with the FTC a preliminary report and on the one hundred-fiftieth day following entry of this Order file a supplemental report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

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XVI.

IT IS FURTHER ORDERED that all notices required of Defendants by this Order shall be made to the following address:

Associate Director
Division of Marketing Practices
Federal Trade Commission
Room 238
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

XVII.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

DONE and ORDERED, in chambers, Miami, Florida, this 5th day of April, 1994.

s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc:
Richard Quaresima, Esq.
Linda L. Carroll, Esq.
Steven Saber, Esq.

APPENDIX D — RELEVANT STATUTES AND REGULATION

15 U.S.C. § 45

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

* * *

15 U.S.C. § 53(b)

§ 53(b). Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe —

> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public —

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to

enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides *or* transacts business.

16 C.F.R. § 436.2

§ 436.2 Definitions

As used in this part, the following definitions shall apply;

(a) The term *franchise* means any continuing commercial relationship created by any arrangement or arrangements whereby:

(1)(i)(A) a person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(*1*) Identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter "franchisor"); or

(2) Indirectly or directly required or advised to meet the quality standards after "franchisor") where the franchisee operates under a name using the trademark, service mark, trade

name, advertising or other commercial symbol designating the franchisor; and

(B)(*1*) The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or

(*2*) The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities, or business affairs; *Provided, however,* That assistance in the franchisee's promotional activities shall not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; or

(ii)(A) A person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(*1*) Supplied by another person (hereinafter "franchisor"), or

(*2*) Supplied by a third person (e.g., a supplier) with whom the franchisee is directly or indirectly required to do business by another person (hereinafter "franchisor"); or

(*3*) Supplied by a third person (e.g., a supplier) with whom the franchisee is directly or indirectly advised to do business by another person (hereinafter "franchisor") where such third person is affiliated with the franchisor; and

(B) The franchisor;

Appendix D

(*1*) Secures for the franchisee retail outlets or accounts for said goods, commodities, or services; or

(*2*) Secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales display used by the franchisee in the offering, sale, or distribution of said goods, commodities, or services; or

(*3*) Provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations referred to in paragraphs (a)(1)(ii)(B) (*1*) and (*2*) of this section; and

* * *

(b) The term *person* means any individual, group, association, limited or general partnership, corporation, or any other business entity.

(c) The term *franchisor* means any person who participates in a franchise relationship as a franchisor, as denoted in paragraph (a) of this section.

(d) The term *franchisee* means any person (1) who participates in a franchise relationship as a franchisee, as denoted in paragraph (a) of this section, or (2) to whom an interest in a franchise is sold.

(e) The term *prospective franchisee* includes any person, including any representative, agent, or employee of that person, who approaches or is approached by a franchisor or franchise broker, or any representative, agent, or employee thereof, for the purpose of discussing the establishment, or possible establishment, of a franchise relationship involving such a person.

* * *

APPENDIX E — RECEIPT FOR SEALED DOCUMENT

CASE NO.: *93-2257-Civ-Nesbitt*

Federal Trade Commission

vs.

Jordan Ashley, Inc. et al.

SEALED DOCUMENT

(Plaintiff/Defendant): *Linda Carroll - Receiver*

Unclassified Description:

Date Sealed: *3-16-94*

Location: *Vault*

RECEIPT FOR SEALED DOCUMENT

Receipt for Sealed Document(s) from *Michele A. Tarallo*
(Courtroom Deputy)

is hereby acknowledged this date; I, *Helen Robinson*
(Docket Clerk)

will docket same, forthwith, and hand carry the sealed document(s) to the Docketing Supervisor or Workleader for processing.

3-16-94
Date

Appendix E

DOCUMENT TO BE UNSEALED BY ORDER OF COURT UPON GOOD CAUSE SHOWN.

Start XE _/_/_ Stop XE _/_/_ Docket Clerk: *HR*
Start __/_/_ Stop __/_/_ Docket Number: *124*
Records Clerk:___

SEAL
Certified to be a true and
correct copy of the original,
Carlos Juenke, Clerk
U.S. District Court
Southern District of Florida
By *Warren P. Canda*
Deputy Clerk
Date *6/21/95*

APPENDIX F — SEALED DOCUMENT — MARCH 10, 1994 LETTER FROM LINDA CARROLL TO JUDGE LENORE C. NESBITT

SPENCER & KLEIN

PROFESSIONAL ASSOCIATION

ATTORNEYS AT LAW

Suite 1901
801 Brickell Avenue
Miami, Florida 33131

Telephone (305) 374-7700
Telecopier (305) 374-4890

March 10, 1994

Honorable Lenore C. Nesbitt
United States District Judge
301 North Miami Avenue
Miami, Florida

RE: *FTC v. Jordan Ashley, et al*
Case No. 93-2257-Civ-Nesbitt

Dear Judge Nesbitt:

I am enclosing a copy of a Motion that I have received from Mr. Steven Saber, counsel for Mr. Thomas P. Norton. Also enclosed is a copy of the Response that I have filed with the court. The purpose of this letter is to request that Mr. Norton be required to testify, under oath, at next Monday's hearing, and identify all jewelry, money, and assets that he claims ownership to, in view of what is alleged or implied in his Motion.

I am sure you recall that Mr. Norton has repeatedly stated in court that *he is without assets and funds,* and that it is only

due to the generosity of his mother that he has been able to maintain himself. Moreover, the sworn financial statement that he provided to the FTC, pursuant to your order of December 6, 1993, lists no jewelry or cash. However, his recent Motion claims that I have "misapplied/mishandled" a "4 carat diamond" ring that he had in a suit jacket.

A ring was found about a week after he failed to repay the $30,000, to purge himself of contempt. The ring was secured in the same way that I have secured jewelry claimed by Pat Riley. Moreover, I also found $6,500 in cash. I did not advise Mr. Norton about the ring, nor the money, because of his denial of assets and refusal to repay the $30,000 he misappropriated. Indeed, I have been waiting for an opportunity to pursue these discrepancies. Obviously, Mr. Norton now knows that I have found his ring since the clothing was returned to him last Sunday. However, it would appear that he is still not ready to acknowledge the $6,500 in cash that he had secreted in his closet and that he lied about these assets.

My present concern is that Mr. Norton will later claim more money or jewelry were in the condominium. I have already located records demonstrating that he files law suits and bar grievances against lawyers who cross him. While I cannot stop that, I would request that a formal record be made, based on his own sworn statement, about cash, jewelry and assets that he possessed or claims that belong to him. Moreover, if you determine to make this inquiry, I would request that you not inform him, at this time, that I have advised you that I located either the ring or the $6,500 in cash. For that reason, I am not sending a copy of this letter to his attorney.

Appendix F

Very truly yours,

s/ Linda L. Carroll
LINDA L. CARROLL

LLC/gs

APPENDIX G — FINDINGS OF FACT AND ORDER FILED DECEMBER 20, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
SOUTHERN DIVISION

CASE NO. 93-2257-Civ-NESBITT

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

JORDAN ASHLEY, INC., GOLD COAST DEVELOPERS, INC. NATIONAL VENDING SYSTEMS, LTD., INC., CHRISTINE M. HELLER, KELLY J. BLASI, THOMAS P. NORTON,

Defendants.

FINDINGS OF FACT AND ORDER ON RECEIVER'S PETITION FOR INSTRUCTIONS AND ON MOTION OF PATRICIA RILEY TO MODIFY INJUNCTION

THIS MATTER came on for hearing following the filing of the Receiver's Petition Requesting Instructions of the Court. Thereafter, the Court also received an Emergency Motion of Patricia Riley for Modification of Injunction. An Evidentiary hearing was conducted on December 15, 1993, encompassing both matters. Based upon the evidence presented, the Court enters the following factual findings and orders:

1. On December 6, 1993, this Court entered an Ex-Parte Injunction, ordered and directed a freeze on all assets of all of

the Defendants, and, appointed a Receiver for the corporate Defendants.

2. On December 8, 1993, the Plaintiff perfected service of all pleadings, the Ex-Parte Injunction, and, order freezing all assets, on each of the named individual Defendants, as well as on representatives on each of the corporate Defendants.

3. On December 8, 1993, the Receiver entered the offices of the corporate Defendants to take custody and control.

4. During the evening hours of December 8, 1993, the corporate offices of the corporate Defendants were broken into after all locks to the exterior doors had been changed. During that break-in computer disks and back-up computer tapes were removed, and damage was done to the hard-drive of the computer system. Certain other items are also known to have been removed.

5. After reviewing books, records, and documents belonging to the corporate Defendants, evidence was found and presented at the Evidentiary Hearing that established that the funds and assets of Defendant Gold Coast Developers, Inc., have been systematically removed and transferred to and otherwise used for the benefit of a corporation known as Red Lion Seafood, Inc., d/b/a/ Red Lion Ostrich Hatchery, Inc., for the period beginning in late January, 1993 through and including December 3, 1993.

6. The funds and assets of Gold Coast Developers, Inc., were also utilized to purchase and to fully pay the mortgage on a condominium, to-wit: Unit Number 2503, One Island Place Condominium II, 3801 N.E. 207th Street, North Miami Beach, Florida 33180.

Appendix G

7. At the Evidentiary Hearing, Patricia Riley testified that she married Defendant Thomas P. Norton on September 21, 1993. Ms. Riley introduced into evidence a document that purported to be a Deed dated September 21, 1993, conveying Unit 2503 at One Island Place Condominium II, from Gold Coast Developers, Inc., to her for which she acknowledged that she had not given any consideration to Gold Coast Developers, Inc. Also introduced into evidence was an Antenuptial Agreement, also bearing the date of September 21, 1993, that was signed by Patricia Riley and Defendant Thomas P. Norton. The Antenuptial Agreement provides, in part, that upon Mr. Norton's death, Ms. Riley would receive his interest in Unit 2503, One Island Place Condominium II. Ms. Riley testified that the Deed was executed during the morning of September 21, 1993, prior to her marriage to Mr. Norton, and, prior to their executing the Antenuptial Agreement.

8. On September 21, 1993, there still existed a mortgage on Unit 2503 and it was subsequently paid in full by Gold Coast Developers, Inc., from its funds and assets.

9. On December 13, 1993, the Receiver entered Condominium Unit 2503 and took custody and control of it. Located within Unit 2503 were the cancelled checks and bank statements of Gold Coast Developers, Inc., for 1993. The corporate books for Defendant Jordan Ashley, Inc., and Defendant Gold Coast Developers, Inc., were also found secreted in Unit 2503.

10. On December 14, 1993, Patricia Riley withdrew a total of $85,000.00 from the bank account of Red Lion Ostrich Hatchery, Inc., at Northern Trust Bank, N.A. Ms. Riley withdrew $30,000.00 in cash, and she obtained three Cashier's Checks

drawn against that account. One Cashier's Check was in the sum of $30,000.00 made payable to Designs in Motion, Inc., a second Cashier's Check was payable to the law firm of Buchanan Ingersoll in the sum of $20,000.00, and a third Cashier's Check was also payable to the Buchanan Ingersoll firm in the amount of $5,000.00.

11. Counsel representing the individual and corporate Defendants acknowledged that his firm, Buchanan Ingersoll, had received both Cashier's Checks and that they were deposited into the firm's trust account. Ms. Riley testified that she deposited the $30,000.00 Cashier's Check into the account of Designs in Motion, Inc., which is her corporation, at First Union National Bank. She similarly testified that she gave the $30,000.00 in cash to Defendant, Thomas P. Norton.

12. The evidence presented also supports the Receiver's conclusion that substantial sums belonging to Gold Coast Developers, Inc., had been transferred to and utilized for the benefit of Red Lion Seafood, Inc. d/b/a Red Lion Ostrich Hatchery, Inc.

13. Abundant evidence was also introduced to establish that at the time that Patricia Riley removed the funds from the account of Red Lion Ostrich Hatchery, Inc., on December 14, 1993, that she and the individual Defendants had knowledge of this Court's Order of December 6, 1993.

Based upon the foregoing findings and the evidence presented at the hearing, it is hereby

ORDERED AND ADJUDGED that all of the powers, duties, and responsibilities previously conferred upon the

Receiver, Linda L. Carroll, are hereby extended to include full power over Red Lion Seafood, Inc., d/b/a/ Red Lion Ostrich Hatchery, Inc. All powers, duties, and responsibilities heretofore enumerated in the Order entered on December 6, 1993, appointing the Receiver, are expressly incorporated herein and made applicable to these entities.

It is further **ORDERED AND ADJUDGED** that:

1. Patricia Riley and Thomas P. Norton are hereby ordered to return the $30,000.00 in cash that was withdrawn by Patricia Riley from the Account of Red Lion Ostrich Hatchery, Inc., to the Receiver no later than 4:00 p.m. on Friday, December 17, 1993.

2. First Union National Bank is directed to transfer the $30,000.00 deposited into the account of Designs in Motion, Inc., by Patricia Riley, upon the request and at the direction of the Receiver in this cause.

3. The firm of Buchanan Ingersoll is hereby directed to return $20,000.00 which it has on deposit in its Trust Account from Ms. Riley to the Receiver no later than 4:00 p.m. on Friday, December 17, 1993.

4. The firm of Buchanan Ingersoll is allowed to retain in its Trust Account the remaining $5,000.00 that was given to it by Patricia Riley on December 14, 1993 until otherwise ordered by this Court.

5. The Emergency Motion of Patricia Riley to Modify the Injunction, and, request that she be allowed to remain at Unit

2503 One Island Place Condominium II, is denied.[1] Based upon the evidence presented at the Evidentiary Hearing, this Court agrees with the concerns of the Receiver that Ms. Riley and Mr. Norton have clearly demonstrated a pattern and practice of removing and improperly dealing with assets of the Defendant corporations, including the improper transfer of title to Condominium Unit 2503 into the name of Ms. Riley without consideration. Moreover, the evidence presented fully established that Condominium Unit 2503 was purchased and fully paid for solely with the funds and assets of Gold Coast Developers, Inc.[2]

6. It is further **ORDERED** that this Court continues to retain jurisdiction of this matter for all purposes.

DONE AND ORDERED this 20 day of December, 1993, *at 4:10 p.m.*

s/ Lenore C. Nesbitt
UNITED STATES STRICT JUDGE

---

1. In her Motion, Ms. Riley also noted and objected to the Receiver's assuming control over the condominium without a prior hearing, citing to the recent Supreme Court opinion in *United States v. James Daniel Good Real Property et. al.*, 1993 WL 505539 (December 13, 1993). The opinion in *James Daniel Good*, had not been announced at the time of entry of the Injunction and the appointment of the Receiver in this cause on December 6, 1993. Moreover, even assuming that the *James Daniel Good* decision were applicable to the instant case, this Court has provided an immediate and full Evidentiary Hearing to all interested persons as was otherwise intended by the Supreme Court in the *James Daniel Good* decision.

2. This Court need not decide and specifically reserves on the issue of whether it should enter a further order avoiding the quit claim deed that was issued to Patricia Riley.

Appendix G

Copies to:
Linda L. Carroll, Receiver
Richard A. Quaresima, Esquire
Gary Phillips, Esquire
Thomas R. Spencer, Esquire
Counsel for the Receiver

APPENDIX H — ORDER VOIDING DEED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93 -2257-CIV-NESBITT

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

JORDAN ASHLEY, INC., et al.,

Defendants.

ORDER VOIDING DEED

This cause comes before the Court upon the Receiver for Defendants Jordan Ashley, Inc., Gold Coast Developers, Inc., and National Vending Systems, Ltd., Inc.'s (collectively "Corporate Defendants") Motion For Order Voiding Deed. The motion addresses a certain Quit Claim Deed on December 9, 1993 under Clerk's File NO. 93R-606187 and in Official Records Book 16162, at Page 4771, of the Public Records of Dade County, Florida. Through the deed, Gold Coast Developers Inc., as Grantor, purportedly conveyed to Patricia Riley, as Grantee, all of its right, title, and interest in and to the following described real property located in Dade County, Florida, to wit:

> Unit No. 2503, in One Island Place Condominium, II, according to the Declaration of Condominium thereof, and all exhibits thereto, recorded on October 16,

Appendix H

1991 in Official Records Book 15230, Page 2313, of the Public Records of Dade County, Florida.

For the reasons set forth in the Final Judgment entered on April 5, 1994 and the Court's Order of July, 1994, the Receiver's motion for order voiding deed is hereby GRANTED. The deed is hereby canceled and declared null and void as a fraudulent transfer, and of no force and effect, and the title to the above described property is vested in Linda L. Carroll, Esquire, Spencer & Klein, P.A., 801 Brickell Avenue, Suite 1901, Miami, Florida 33131, as Receiver for the Corporate Defendants, her successors and assigns.

DONE and ORDERED, in chambers, Miami, Florida, this 29th day of July 1994.

s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc:
Linda M. Carroll, Esq.
Richard A. Quaresima, Esq.
Steven S. Saber, Esq.
Steven M. Goldsmith, Esq.

APPENDIX I — SUMMARY OF HANDWRITTEN CONSUMER COMPLAINTS

Summary of
Handwritten Consumer Complaints
(18 Complaints Total)

Repeat Complaints:

Ignored after purchase, ie, problem returning calls, excuses (11/18)

Exclusive territory expected (8/18)

Shortages (mostly goods) (6/18)

Sales figures exaggerated (5/18)

No customer support/service (4/18)

Free exchange either delayed or defaulted (3/18)
Delay hearing from location company (3/18)
Delay in after-shipment (eg samples) (3/18)

Right of first refusal to expand area (2/18)
High minimum reorder quantities (2/18)
References give glowing reports (2/18)
Salesman said location company is required (2/18)
Cards not marketable in locations (2/18)
Locations refused to carry cards or asked to remove (2/18)
Bookkeeping system substandard (2/18)
Ignored by location company after first service (2/18)
Expected new cards every few months and holidays (2/18)
Liquidated other investments/savings (2/18)
No mention shipping charge at time of purchase (2/18)
Would not have bought without location company (2/18)

Appendix 1

Exceptional One-Time Complaints:

Paid storage fee for shipment on bad day
Billed by airborne for catalog by mistake
Territory cannot support number of distributors
Promised JAG would sell business if dissatisfied 3 months
Location company employee forged check; locator wants second payment
No mention location company at time of purchase
Second location company soliciting
Extreme personal and financial difficulties
Promised continuous assistance and training
Could cancel if changed mind without going into business
Location company, not distributor to meet with retail locations
Location going out of business
Told location company knows where sales best
Location representative new/inexperienced
Distributor did not like locations
Delay with initial shipment
Told noone ever fails in this business
No 6-month return on investment
Pressured to act so not to lose area
Promised assistance
Cards of poor quality
Customer dissatisfied with Kodak
Promised expansion if locations bad
Location company could not locate remote area
Assured location company successful
Refused return of money
References refused

Supreme Court, U.S.
FILED
JUL 29 1997
CLERK

(2)

No. 96-1944

In the Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS P. NORTON, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
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(202) 514-2217

STEPHEN CALKINS
General Counsel

JAY C. SHAFFER
Deputy General Counsel

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Assistant General Counsel

LAWRENCE DEMILLE-WAGMAN
Attorney
Federal Trade Commission
Washington, D.C. 20580

16 pp

QUESTIONS PRESENTED

1. Whether sufficient evidence supports the district court's conclusion that petitioners violated Section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. 45, in connection with their marketing of greeting card display rack business ventures.

2. Whether sufficient evidence supports the district court's conclusion that petitioners' business arrangements with their customers were "franchises" within the meaning of the FTC's Franchise Rule, 16 C.F.R. 436.

3. Whether the district court properly entered various orders designed to preserve petitioners' assets from dissipation pending trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1944

THOMAS P. NORTON, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 5a-8a) is unpublished, but the judgment is noted at 101 F.3d 707 (Table). The district court's order entering findings of fact, conclusions of law, and permanent injunctive relief (Pet. App. 10a-34a) is reported at 1994-1 Trade Cas. (CCH) ¶ 70,570. The district court's order affording the receiver relief in certain respects (Pet. App. 44a-50a) is unreported.

[1] Although the petition refers to the Federal Communications Commission as the respondent, the agency that has been the party to this case in the lower courts is the Federal Trade Commission.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1996. A petition for rehearing was denied on February 10, 1997. The petition for a writ of certiorari was filed on May 12, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Thomas P. Norton, Jordan Ashley, Inc., Gold Coast Developers, Inc., and National Vending Systems, Ltd., Inc.,[2] were involved in the distribution of greeting cards through business ventures that they marketed to customers. For a payment of between $5,000 and $15,000, petitioners would supply their customers with an initial inventory of greeting cards and display racks. Customers were also informed that a professional locator service would assist them in finding suitable retail locations for the greeting card displays. Pet. App. 19a-20a.

After receiving numerous complaints from customers about petitioners' greeting-card marketing ventures, the Federal Trade Commission (FTC) filed a complaint against petitioners in district court on November 16, 1993. The complaint alleged that petitioners had violated Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, by making false and misleading representations concerning the greeting card display rack business ventures that

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[2] Patricia Riley, a petitioner in this Court, was not (as relevant here) involved in the business operations of the greeting-card venture and was not one of the original defendants to the complaint brought in district court, but for simplicity we make no further distinction among the petitioners.

they marketed to customers, and the FTC's "Franchise Rule," 16 C.F.R. 436, by failing to provide prospective franchisees with disclosures required by the Rule. The complaint sought monetary relief for injuries suffered by customers as a result of the deceptive trade practices, as well as injunctive relief and the appointment of a receiver.

On December 6, 1993, the district court granted the FTC's request for a temporary restraining order (TRO), appointed a receiver for the corporate defendants, and froze the defendants' assets. On December 8, the receiver, Linda L. Carroll, took control of the corporations' books and offices. In examining the corporate records, Carroll discovered the existence of a condominium purchased with funds from petitioner Gold Coast. She then performed a title search, which revealed that Gold Coast held title to the property, and seized and secured the condominium on December 13.

On December 13, 1993, petitioner Patricia Riley, the wife of petitioner Thomas Norton, moved in district court that the TRO be modified, to permit Riley and Norton to occupy the condominium during the litigation. Riley contended that the condominium belonged to her, not to Gold Coast; her claim was based on a quitclaim deed from Gold Coast to her dated September 21, 1993. Riley, however, had not submitted the deed for recordation until December 9, after she learned of the TRO and the seizure of the corporate offices, and recordation had not been accomplished at the time that the receiver completed her title search. The district court held a hearing on December 15 and then denied Riley's motion, noting that the evidence established that the condominium

had been purchased with funds from Gold Coast. Pet. App. 46a, 48a-49a.

2. On March 8 and 14, 1994, the district court conducted a trial on the merits. The FTC presented testimony from four consumers regarding their experiences with petitioners, from petitioners' tax accountant, who identified tax returns for petitioners Jordan Ashley and Gold Coast Developers; and from the receiver, who described petitioners' corporate structure. The FTC also provided evidence regarding the volume of petitioners' business. Although petitioners cross-examined all the FTC's witnesses, they rested their case without presenting any witnesses of their own, and without introducing any exhibits. See Gov't C.A. Br. 10-11.

On April 5, 1994, the court entered an order concluding that petitioners had violated Section 5 of the FTC Act and the Franchise Rule, and directing relief against petitioners.[3] Pet. App. 10a-34a. As to the Section 5 count, the court ruled that the four consumer-witnesses' testimony, which was "characteristic of those who purchased [petitioners'] business opportunities" (*id.* at 12a), established that petitioners had misrepresented the business opportunities that they marketed to prospective franchisees. The court found specifically that petitioners' representatives would typically represent to investors that they could make substantial sums through the purchase of a distributorship, recouping the initial investment quickly, and that investors could depend on a professional locating company familiar with each

---

[3] The court found that there was no real distinction among the corporate petitioners, and that all the petitioners had engaged in the actionable misrepresentations. Pet. App. 11a.

investor's region of the country to obtain suitable retail outlets for greeting-card sales. *Id.* at 12a-13a. In fact, the court found, "[v]irtually all of these statements later proved to be false" (*id.* at 13a); the locating company usually failed to secure adequate outlets for the card racks and proved unwilling to find replacement locations, investors experienced greatly disappointing sales volume and earnings, and franchisees discovered other distributors in the areas in which they had been promised exclusive distribution rights. *Id.* at 13a-14a.

The court also concluded, based on the same evidence, that petitioners' business arrangements with their customers constituted "franchises" within the meaning of the FTC's Franchise Rule, which requires "a franchisor to provide prospective franchisees with a complete and accurate disclosure containing twenty categories of information." Pet. App. 17a. Under the Rule, a business arrangement may be a "franchise" if (a) the franchisee sells goods or services identified with the service mark of the franchisor, and the franchisor gives "significant assistance" to the franchisee in marketing plans and promotional activities, or (b) the franchisee sells goods or services supplied by the franchisor, and the franchisor provides the services of a person able to secure retail outlets for rack displays. *Id.* at 18a-19a; see 16 C.F.R. 436.2(a)(1)(i) and (ii). The court found that the evidence introduced at trial satisfied both tests for a franchise arrangement, and in particular that petitioners "gave purchasers substantial assistance in operating their distributorships," and that petitioners "insisted that [customers] use a professional locating company specified by [petitioners] in order to select the locations for their [greeting-card] rack

displays." Pet. App. 19a. The court also found that petitioners required their customers to pay fees of substantial amounts, between $5,000 and $15,000, "in order to acquire their initial sets of racks and cards, without which they could not have commenced operation of their card distributorships." *Id.* at 20a.

The district court granted injunctive relief and required petitioners to pay more than $9 million in redress. The court also continued the receivership and ordered the receiver to formulate a plan to satisfy petitioners' liability. To facilitate redress, the court directed petitioners to transfer title to the condominium to the receiver. Pet. App. 20a-30a.

3. On appeal, petitioners challenged the entry of the TRO (permitting seizure of the corporate offices), Pet. C.A. Br. 18-34, the district court's denial of attorney's fees from petitioners' seized funds to defend the action, *id.* at 35-45, the entry of the injunction against a related corporation, *id.* at 45-48, and the seizure of the condominium, *id.* at 48-54. Petitioners did not, however, specifically challenge the factual basis for the district court's findings of liability under either Section 5 of the FTC Act or the Franchise Rule. The court of appeals summarily affirmed. Pet. App. 5a-8a.

ARGUMENT

Petitioners argue (Pet. 20-28) that the evidence does not support the district court's conclusion that they violated Section 5 of the FTC Act and the FTC's Franchise Rule. Those arguments, however, were not raised in petitioners' principal brief in the court of appeals, and, accordingly, have been waived. *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 644-645 (1992). The arguments are in any event without merit, as is petitioners' summary contention (Pet. 28-29) that

they were denied a fair opportunity to present their case to an impartial court. Further review is therefore not warranted.

1. Petitioners contend that evidence presented to the district court did not demonstrate violations of Section 5 of the FTC Act and did not establish that the business opportunities they sold were "franchises" under the FTC's Franchise Rule. Pet. 20-28. The evidence presented to the district court, however, fully supports that court's conclusions.

As to the violation of Section 5 of the FTC Act, the district court based its conclusions on the testimony of six witnesses presented by the FTC at trial, including four customers whose experiences it found to be "characteristic" of those who purchased petitioners' business opportunities. Pet. App. 12a. Those customers testified, and the district court found, that petitioners represented that an investor could expect to make substantial sums through a distributorship, often up to $50,000 per year; that an investor could recoup his initial investment quickly, within six months; and that each investor would have the right to operate as an exclusive distributor within his territory. *Ibid.* "Virtually all of these statements later proved to be false." *Id.* at 13a.

As to the violation of the Franchise Rule, the customer witnesses testified that petitioners' representatives assured them that "a 'professional locating company' familiar with each investor's region of the country would find retail outlets suitable for card sales and willing to accept card display racks." Indeed, petitioners' representatives insisted that their customers defer to the locating companies in choosing retail outlets. The assurances of substan-

tial assistance from the professional locator service also proved false. Pet. App. 13a.

Based on that testimony, the district court was fully justified in concluding that petitioners violated Section 5 of the FTC Act and the Franchise Rule. Petitioners argue, however, that the customers' testimony was based on vague recollection, that the FTC excessively prepared those witnesses for trial, and that the testimony was "tailored by the direct line of questioning by the FTC's attorneys," Pet. 24. Petitioners had ample opportunity to, and did, cross-examine each of the FTC's witnesses. None of petitioners' challenges to the witnesses' testimony demonstrates that any of the district court's specific factual findings was clearly erroneous, see *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-575 (1985), or presents an important legal issue warranting this Court's review.

Petitioners' contentions based on its summary of handwritten consumer complaints received by the FTC, see Pet. 22-28; Pet. App. 53a-54a, are irrelevant. The handwritten complaints were included with the evidence presented to the court in support of the FTC's motion for a TRO. The district court's final judgment, however, was based on the live testimony of witnesses at trial, and not on the TRO evidence. Petitioners were, moreover, free to show at trial that the customers who testified did not have experiences that were characteristic of petitioners' franchisees, but they failed to produce any evidence to support their case.

2. There was also no error in any of the orders entered by the district court to preserve petitioners' assets pending trial.

a. Nothing in the Federal Rules of Civil Procedure or the two statutes cited by petitioners precluded the court from entering a TRO *ex parte* against petitioners. See Pet. 20-21, 28. Federal Rule of Civil Procedure 65(b) expressly contemplates that a TRO may be entered *ex parte* in certain circumstances. See Fed. R. Civ. P. 65(b) ("A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney.").

There is also no basis for petitioners' argument that Section 13(b) of the FTC Act, 15 U.S.C. 53(b), precludes entry of such a TRO. Section 13(b) provides that, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." The courts of appeals that have interpreted Section 13(b) have all held that it does not restrict the equitable powers of the district court, and that it authorizes the court to employ its full complement of inherent equitable powers when enforcing the FTC Act, including the power to grant provisional injunctive relief. See *FTC* v. *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991) (rescission); *FTC* v. *World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988) (preliminary injunction); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (asset freeze, appointment of receiver); *FTC* v. *H. N. Singer, Inc.*, 668 F.2d 1107, 1111, 1113 (9th Cir. 1982) (rescission). Indeed, as this Court has explained, the comprehensiveness of the district court's equitable jurisdiction "is not to be denied or limited in the absence of a clear and valid legislative command." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). No such limitation exists in the FTC Act. Accordingly, there can be no doubt about the district

court's authority to grant an *ex parte* TRO in a proper case.

Nor does 28 U.S.C. 636(b)(1)(C) preclude the FTC from seeking an *ex parte* TRO. That Section provides that, when a matter has been submitted by a district court judge to a magistrate judge for a recommendation, the magistrate judge "shall file his proposed findings and recommendations * * * with the court and a copy shall forthwith be mailed to all parties." Petitioners contend that, because the district judge referred the FTC's motion for a TRO to a magistrate judge, Section 636(b)(1)(C) required the magistrate judge to notify petitioners of his recommendations. Nothing in the language of Section 636 indicates, however, that magistrate judges must give notice in matters that a district judge could properly dispose of *ex parte*. See *Eatable Greetable Products, Inc.* v. *Sweet Stop Inc.*, 627 F. Supp. 777, 779-780 (D. Mass. 1986) (noting that magistrate had recommended entry of *ex parte* TRO).

b. Petitioners incorrectly argue they were entitled to pay their attorneys from funds frozen to preserve the possibility of redressing injured consumers. See Pet. 29. In fact, there is no such right. "Courts regularly have frozen assets and denied attorney fees or limited the amount of attorney fees." *FTC* v. *World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (citing *United States* v. *Monsanto*, 491 U.S. 600, 614 (1989), and *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989) (no constitutional right to use frozen funds for attorney's fees, even in a criminal case)). To the extent that petitioners suggest that *United States* v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989), entitles them to use frozen funds to pay attor-

ney's fees, Pet. 29, they misread that case, which held only that due process requires that an adversary hearing be held before the government "may by forfeiture continue to deprive a criminal defendant of assets to pay attorneys in a criminal case." *United States* v. *Michelle's Lounge*, 39 F.3d 684, 691 (7th Cir. 1994).

c. Finally, there is no merit to petitioners' contention (Pet. 29) that the receiver's seizure of the condominium was unconstitutional because petitioners did not receive a pre-seizure or prompt post-seizure hearing. In fact, the court held an adversary hearing on the matter on December 15, 1993, two days after the seizure. See Pet. App. 44a-50a. Further, as this Court stated in *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993):

> *Unless exigent circumstances are present*, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. * * * To establish exigent circumstances, the Government must show that less restrictive measures—*i.e.*, a *lis pendens*, restraining order, or bond—would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property.

Id. at 62 (emphasis added).[4] Here, exigent circumstances justified the pre-hearing seizure of the condominium. The condominium contained corporate

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[4] *James Daniel Good Real Property* was decided on December 13, 1993, the same day that the receiver occupied the condominium.

property and books that were being hidden from the receiver and could have been destroyed. Pet. App. 46a. Further, by the time of the seizure, the receiver, who is obligated to protect the corporate assets, already knew that petitioners were attempting to destroy evidence and secrete assets. *Id.* at 45a. A *lis pendens* or bond could not have adequately assured that petitioners would not take such actions. In addition, petitioners were already subject to a restraining order and had violated it by withdrawing frozen funds. *Id.* at 46a-47a. Thus, the seizure of the condominium did not deny petitioners due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1997